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No. 02-1674 *et al.*

IN THE

# Supreme Court of the United States

MITCH MCCONNELL *et al.*,

*Appellants,*

v.

FEDERAL ELECTION COMMISSION *et al.*,

*Appellees.*

**On Appeal From The United States District Court For The District of Columbia**

## SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENTS

## VOLUME IV


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## MEMORANDUM OPINION

LEON, District J.

The passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[1] as the record amply indicates, was a considerable legislative achievement that many thought would never come to pass. Indeed, the law constitutes the most comprehensive reform of our national campaign finance system in the past twenty-eight years. As such, it is the latest chapter in the history of a longstanding and recurring problem that our government has been wrestling with since the administration of Theodore Roosevelt.

Titles I and II of BCRA focus principally on a major campaign finance development that has dramatically unfolded over the past decade: the use of corporate and union treasury funds, either directly or through soft money donations to political parties, to finance electioneering communications masquerading, predominantly, as "issue ads." In an attempt to prevent actual and apparent corruption arising from the funding of such sham issue advertisements, Congress enacted a sweeping set of reforms that effectively: alters the methodology of our national, state, and local parties and transforms their relationship with each other; limits the ability of corporations, unions, individuals, and interest groups to engage in communications on public policy; and diminishes the role of federal officeholders in fundraising for political parties and nonprofit interest groups.

For the reasons set forth in the following opinion, I find that the defendants have more than adequately demonstrated the constitutionally necessary basis for Congress: (1) to restrict the use of soft money donations by national, state, and local parties to fund certain types of campaign communications (particularly candidate-advocacy "issue"

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[1] Pub.L. No. 107-155, 116 Stat. 81 (2002).

advertisements) which are designed to, and which do, directly affect federal elections; and (2) to restrict the airing of corporate and union electioneering communications which promote, oppose, attack, or support specific candidates for the office which they seek.

Notwithstanding this conclusion, however, I do not find that the defendants have demonstrated a sufficient constitutional basis to support Congress's decision: (1) to ban the solicitation, receipt, and use of soft money by national parties for purposes that do not directly affect federal elections; (2) to ban state and local parties from using soft money to fund a variety of election activities that do not directly affect federal elections; (3) to ban the use of corporate and union treasury monies to fund genuine issue advertisements that are aired during a particular time period preceding election even though they do not directly advocate the election or defeat of a federal candidate; (4) to ban national parties from donating to and soliciting soft money for certain Section 501(c) and Section 527 organizations under the Internal Revenue Code; (5) to prohibit federal officeholders from raising soft money for their national parties; and (6) to require broadcast licensees to collect and disclose certain records in connection with requests to purchase broadcast time. To the contrary, I find that in trying to do so Congress has unconstitutionally infringed upon the First Amendment rights of the various political actors and their supporters.

In short, the defendants, in my judgment, have been able to establish in some respects, but not in others, a sufficient basis for Congress's intervention in dealing with these problems. As to those where they succeeded, I believe it would make a mockery of existing Supreme Court precedent and the regulatory scheme that it has heretofore blessed, to hold otherwise. As to those where they have not, the protections



accorded the plaintiffs under the First Amendment more than adequately warrant their undoing.

The following is a brief outline of my opinion, which has been organized on a title by title basis. With respect to the opinion itself, to the extent I have agreed with both the judgment and reasoning of either of my colleagues (or both), I have so noted and refrained from writing. As to those sections where I have agreed only in the judgment of one or more of my colleagues, I have limited the discussion of my reasoning to that necessary to explain how I reached my holding. To the greatest extent possible I have tried to acknowledge and address any disagreements we have had factually. However, in light of the importance and enormity of the record, I have included in my opinion a complete set of my Findings of Fact which I relied upon in reaching my judgments.

* * *

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I. Title I: Restrictions on Nonfederal Funds New FECA Sections 323(a), 323(b), 301(20)(a), 323(d), 323(e), and 323(f)

A. New FECA Section 323(a): Nonfederal Fund Restrictions on National Parties

I agree with Judge Henderson's conclusion, although for different reasons, that Congress, in essence, is constitutionally prohibited from regulating a national party's ability to solicit, receive, or use nonfederal funds (i.e., soft money) for nonfederal and mixed purposes. To the extent that Section 323(a) seeks to regulate donations to national parties that are used for purposes that at the most *indirectly* affect federal elections (i.e., nonfederal or mixed purposes), the defendants have failed to demonstrate that Section 323(a) serves an

important government interest, or even if they had, that it is sufficiently tailored to serve that interest.

However, I find that Congress can restrict a national party's use of nonfederal money to directly affect federal elections through communications that support or oppose specifically identified federal candidates. Therefore, like Judge Kollar-Kotelly, I find constitutional Congress's ban on the use of nonfederal funds by national parties for Section 301(20)(A)(iii) communications. As a result, I concur in part in, and dissent in part from, Judge Henderson's judgment and reasoning regarding Section 323(a).

1. Standard of Review for Restrictions on Donations to Political Parties

The right to freedom of political association under the First Amendment is a fundamental right of donors to political parties, *see Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976),[2] and arguably of the political parties themselves, *see FEC v. Colorado Republican Fed. Campaign Comm. ("Colorado II")*, 533 U.S. 431, 448 n.10 (2001). Our national political structure is firmly anchored by our two major parties.[3] The

[2] In *Roberts v. United States Jaycees*, the Supreme Court declared that "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (citing *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981)).

[3] *See FEC v. Colorado Republican Fed. Campaign Comm. ("Colorado I")*, 518 U.S. 604, 618, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (noting that political parties play an "important and legitimate role . . . in American elections"); *Davis v. Bandemer*, 478 U.S. 109, 144-45, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (O'Connor, J., concurring in judgment) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government ."); *see also* Findings of Fact ("Findings") 20-26.



role those national parties play in defining wide-ranging political agendas and bringing together individuals (and their financial resources) on behalf of those political agendas is critical to the stability our political system has enjoyed over the past 200 years.[4]

Upon giving money to a political party, or to any political organization for that matter, a donor hopes that the organization will amplify his political perspective or candidate preference.[5] Any number of activities by a political party can amplify the donor's political voice. Some activities, like direct contributions to state candidates, are for a nonfederal purpose because they have no effect on a federal election. Others, like public communications that advocate the election or defeat of a particular federal candidate, are for a federal purpose because they *directly* affect federal elections. And still others, like generic voter registration and genuine issue advertisements,[6] are for "mixed purposes" because they *indirectly* affect both state and federal elections. Regardless of the purpose served, all of these party activities, paid for with aggregated donations, express loudly, and often effectively, the donor's political position.[7] For this reason, an

[4] *See California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." (citing Noble E. Cunningham, Jr., *The Jeffersonian Republican Party*, in 1 *History of U.S. Political Parties* 239, 241 (Arthur M. Schlesinger, Jr. ed., 1973))).

[5] *See, e.g.*, Findings 14-19.

[6] For a discussion of the distinction between genuine issue advertisements and "sham" issue ads designed to directly affect a federal candidate's election, see Findings 288-89 and *infra* Parts I.A.3 & I.B.2.

[7] *See Colorado II*, 533 U.S. at 453 ("[A] party combines its members' power to speak by aggregating contributions and broadcasting messages

individual's donation to a political party is an act of political association protected by the First Amendment. But as important as this right is, it is not absolute.

The Supreme Court, in *Buckley v. Valeo* and ensuing campaign finance cases, has recognized Congress's power through FECA [8] to regulate, in effect, the source and amount of contributions to political parties and candidates that donors could make *for the purpose of influencing federal elections.*[9]

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more widely than individual contributors generally could afford to do."); *FEC v. Massachusetts Citizens for Life ("MCFL")*, 479 U.S. 238, 261, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction."); *Citizens Against Rent Control*, 454 U.S. at 294 ("[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."); *id.* at 296 (citing *Buckley*, 424 U.S. at 65-66); *Buckley*, 424 U.S. at 15, 22. Alexis de Toqueville observed:

> As soon as several of the inhabitants of the United States have conceived a sentiment or an idea that they want to produce in the world, they seek each other out; and when they have found each other, they unite. From then on, they are no longer isolated men, but a power one sees from afar, whose actions serve as an example; a power that speaks, and to which one listens.

2 Alexis de Tocqueville, *Democracy in America* 492 (Harvey C. Mansfield & Delba Winthrop eds., 2000).

[8] Federal Election Campaign Act of 1971 ("FECA"), Pub.L. No. 92-225, 86 Stat. 3 (1971 provisions) (codified as amended at 2 U.S.C. §§ 431 *et seq.*)

[9] *See Buckley*, 424 U.S. at 23-35 (upholding contribution limitations to candidates and their political committees); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390-98, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (same); *see also California Medical Ass'n v. FEC ("California Medical")*, 453 U.S. 182, 197-99, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (upholding contribution limitations to PACs). The Supreme Court has never explicitly addressed limitations on contributions to political parties. The $20,000, now $25,000, limit on contributions to national parties was not even added to FECA until the post-Buckley 1976 amendments. *See*



In enacting such contribution limitations Congress had to demonstrate that it was doing so in furtherance of the important government interest of preventing actual or apparent corruption of either the officeholder or the federal electoral system. *Buckley*, 424 U.S. at 25; *see, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298-99 (1981); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000).[10] Indeed, in addressing contribution limitations, preventing actual or apparent corruption is the only government interest the Supreme Court has found sufficient to interfere with associational rights. *FEC v. National Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 496-97 (1985). In *Buckley*, the Supreme Court explained:

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined . . . . Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from

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Pub.L. No. 94-283 § 320, 90 Stat. 475 (codified as amended at 2 U.S.C. § 441a(a)(1)(B)); *see also California Medical*, 453 U .S. at 194 n. 15; BCRA § 307(a)(2) (raising amount individuals can contribute to national parties from $20,000 to $25,000); BCRA § 102 (raising amount individuals can donate to state parties from $5,000 to $10,000); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D). Contribution limitations to parties, however, have been upheld indirectly, *see Buckley*, 424 U.S. at 38 (upholding FECA's $25,000 limitation on total contributions, which included "huge contributions to the candidate's political party"), and in dictum, *see Colorado I*, 518 U.S. at 617 (recognizing $20,000 contribution limit to political parties and citing 2 U.S.C. § 441a(a)).

[10] If a contribution limitation survives a claim that it infringes associational rights, then it also survives a speech challenge. *See Shrink Missouri*, 528 U.S. at 388. Note also that the challenge based on the donor's associational right is "correlative" to an overbreadth challenge. *See id.* at 388 n. 3.

public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. 424 U.S. at 26-27. In each case where the Supreme Court upheld contribution limitations, *see supra* note 9, the Court reviewed those limits under *Buckley's* "closely drawn" scrutiny, a standard of review somewhat less rigorous than strict scrutiny, by which "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 420 U.S. at 25 (internal quotations omitted); *see also California Medical Ass'n v. FEC ("California Medical")*, 453 U.S. 182, 196, 196 n.16 (1981).

Nevertheless, the plaintiffs argue, and Judge Henderson agrees, that any limitation on a national party's ability to raise and use nonfederal money must pass muster under the strict-scrutiny standard of review that the Supreme Court has traditionally applied to analyze expenditures. *See, e.g.*, Republican National Committee ("RNC") Opening Br. at 51-53. I disagree.

While I agree that Section 323(a)'s prohibitions on soliciting, receiving, and using nonfederal funds restricts a party's ability to spend nonfederal money, their principal effect is to limit the ability of future donors through their contributions to use the national parties to amplify their voices.[11] Therefore, in determining to what extent Congress

[11] That is, Section 323(a) limits an individual, wishing to express his political agenda, to donations of hard money up to $25,000, the limitation on contributions to parties under FECA. 2 U.S.C. § 441a(a)(1)(B); *see also* BCRA § 307(a)(2) (raising how much individuals can contribute to national parties from $20,000 to $25,000).



can limit donations to national and state parties,[12] this Court should review the limitations using the closely-drawn standard of review applied to contribution limitations in *Buckley*, 420 U.S. at 25, and ensuing campaign finance cases,[13] in which the Court specifically acknowledged "that restrictions on contributions require less compelling justification than restrictions on independent spending." *FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 259-60 (1986); *see also Shrink Missouri*, 528 U.S. at 387. The Supreme Court lowered the hurdle for contributions, *see Shrink Missouri*, 528 U.S. at 387-88, because restrictions on contributions, in its judgment, impact associationalrights less by leaving "the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates," *id.* at 387 (quoting *Buckley*, 424 U.S. at 22) (internal quotations omitted), and by not preventing "political committees from amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21. Surely, these reasons for applying a lower standard of scrutiny for donations to candidates and their political committees are no less persuasive for analyzing contributions to political parties.

The plaintiffs, nevertheless, maintain that in *Citizens Against Rent Control*, which involved limitations on contributions to political committees with the purpose of supporting or opposing ballot measures, 454 U.S. at 291, the

[12] This standard of review applies to all donation restrictions under Title I of BCRA.

[13] Since the practical effect is that any restriction on solicitation is subsumed within the restriction on receipt of donations, which I maintain should be reviewed under closely-drawn scrutiny, there is no reason to apply a different standard of review for the solicitation restriction. In the end, if the political parties are restricted from receiving nonfederal donations for federal purposes, then they are restricted from soliciting funds for those purposes as well.

Supreme Court settled on strict-scrutiny review for contribution limitations to political organizations.[14] This conclusion is not based on a close enough reading of the case. While the plurality does suggest the undefined standard of "exacting judicial scrutiny," *Citizens Against Rent Control*, 454 U.S. at 294, 298, the three concurring justices either specifically applied closely-drawn scrutiny, *id.* at 301 (Marshall, J., concurring),[15] or equated the plurality's "exacting scrutiny" with *Buckley's* closely-drawn scrutiny, *id.* at 302 (Blackmun, J., & O'Connor, J., concurring).[16] Thus, if

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[14] *See* McConnell Opp'n Br. at 17; *see also* J. Henderson Op. at Part IV.D.1.a.

[15] Justice Marshall observed:

> [T]his Court has *always* drawn a distinction between restrictions on contributions, and direct limitations on the amount an individual can expend for his own speech. . . . Because the Court's opinion is silent on the standard of review it is applying to this contributions limitations, I must assume that the Court is following our consistent position that this type of government action is subjected to less rigorous scrutiny than a direct restriction on expenditures.

*Citizens Against Rent Control*, 454 U.S. at 301 (Marshall, J., concurring).

[16] Although "exacting judicial scrutiny" is oft-cited, its parameters are loosely defined in other cases as well. The Supreme Court, for example, employed the phrase "exacting scrutiny" when reviewing FECA's disclosure requirements in *Buckley*, 424 U.S. at 64, explaining that the government interest must be "sufficiently important," *id.* at 66, and "substantial," *id.* at 80. To give another example: in *First National Bank of Boston v. Bellotti*, the Supreme Court applied "exacting scrutiny" to contribution and expenditures limitations on corporations; it stated that the government must show a "compelling" interest, 435 U.S. 765, 786, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960)), and that the interest must be "closely drawn to avoid unnecessary abridgment," *Bellotti*, 435 U.S. at 786 (quoting *Buckley*, 424 U.S. at 25). In any event, since it is uncontroverted that preventing actual and apparent corruption is a "compelling" government interest, *see, e.g., NCPAC*, 470 U.S. at 496-97, the only remaining dispute is whether any donation restriction need be "narrowly tailored" or "closely drawn" to serve the compelling



anything, *Citizens Against Rent Control* suggests that closely-drawn scrutiny should apply, even if the political organization is established exclusively for a purpose unrelated to federal campaigns. Restrictions on national political parties, which engage in both candidate-specific *and* issue-oriented activities, do not deserve to be treated with greater vigilance. Indeed, considering the standard of review adopted by the Supreme Court in *Citizens Against Rent Control* and the fact that contribution regulations are less jarring of associational rights than are expenditure restrictions, restrictions on donations to political parties should be similarly regulable if they are closely drawn to serve the compelling government interest of preventing corruption and its appearance.

### 2. Donations Used to Directly Affect Federal Elections are Regulable by Congress

Section 323(a) of BCRA seeks to expand Congress's authority to regulate donations that by definition did not appear to be regulable under FECA because, ostensibly, they were not given for the purpose of influencing federal elections.[17] It does so in sweeping fashion: national parties "may not solicit, receive, . . . direct . . . transfer, or spend any funds that are not subject to the limitations, prohibitions, and reporting requirements of this Act." BCRA § 101; FECA § 323(a); 2 U.S.C. § 441i(b)(1). Congress seeks this expansion, principally, because the national parties have increasingly, over the past decade, exploited a so-called

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government interest in combating corruption. And *Buckley*, coupled with the various opinions in *Citizens Against Rent Control*, seemingly foreclose that question in favor of *Buckley's* closely-drawn scrutiny.

[17] If they had been intended by the donor to influence federal elections, they should have been treated, at the time they were received, as federal money. As stated earlier, the Supreme Court has, in effect, upheld limitations on contributions to political parties, *see supra* note 9, and a "contribution," as defined by FECA, is a donation "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

"loophole" [18] in FECA that fails to regulate the use of these nonfederal funds for various types of electioneering communications that advocate the election or defeat of a specifically identified candidate.[19]

The defendants contend that Congress, in its attempt to close this "loophole," can limit *any* donation to a national party, regardless of the purpose for which it is used thereafter. *See* Intervenors Opp'n Br. at 26. I disagree. The plaintiffs, on the other hand, contend that Congress can only limit donations that are funneled thereafter through the party as coordinated expenditures, direct contributions to candidates, or uncoordinated expenditures for express advocacy as defined by the "magic words." *See, e.g.*, McConnell Opening Br. at 36; McConnell Opp'n Br. at 25-26; *see also Buckley*, 424 U.S. at 44 n.52 (providing examples of "express words of advocacy"). With that I disagree, as well. Both contentions are calculatingly indifferent to what reason, and precedent, have shown to be the only constitutionally viable antidote to corruption or its appearance: restrictions on donations to political parties based upon their *use to directly affect federal elections*.[20] In this sense, from my perspective, the issue

[18] This so-called "loophole" was created through Federal Election Commission ("FEC") advisory opinions. *See* McCain Dep. at 63 (stating that BCRA will "close certain loopholes that have been opened by the FEC, not through acts of Congress"); FEC Advisory Op.1995-25; FEC Advisory Op.1979- 17; FEC Advisory Op.1978-10.

[19] *See, e.g.*, McCain Dep. at 192-93 (explaining that grassroots activities are "the fundamentals of a democratic process" and that "it's the broadcast television and radio ads that we believe are what is the problem"); Meehan Dep. at 218-19 (explaining that voter mobilization efforts are "good for the system" and distinguishing those efforts from candidate advocacy).

[20] Even the plaintiffs acknowledged that "[i]f BCRA limited only party activities directly related to federal candidates, Defendants might have the better argument." California Democratic Party ("CDP)/California Republican Party ("CRP") Reply Br. at 9.



before the Court is not whether Congress can limit donations to political parties,[21] but to what extent it can do so.

In *Shrink Missouri*, the Supreme Court made it clear that the amount of evidence needed to satisfy judicial scrutiny of restrictions on associational rights depends on the "novelty and plausibility of the justification raised." 528 U.S. at 391. Here, Congress relies upon the government interest of preventing actual and apparent corruption to justify the restrictions on nonfederal funds. When nonfederal funds are being used by national parties for nonfederal or mixed purposes, the government's interest in preventing corruption or its appearance to justify this restraint is so novel, and implausible, that it requires a substantial amount of evidence to withstand constitutional scrutiny. However, when nonfederal funds are being used by national parties for the federal purpose of directly benefitting the election of candidates [22] through either express advocacy or "issue" advocacy of the type defined in Section 301(20)(A)(iii),[23] the government's use of that interest to justify congressional intervention is neither novel, nor implausible, because the risk of corruption, *see infra* Part I.B.2, naturally flows from

[21] *See supra* note 9.

[22] There is no disagreement that political parties use donations for federal purposes. *See* Findings 30-52; *see also Colorado II*, 533 U.S. at 449 ("Parties are . . . necessarily the instruments of some contributors whose object is . . . to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors."). Political parties, *inter alia*, provide direct contributions to candidates, *see* 2 U.S.C. § 441a(a)(2)(A) (setting contribution limit by political committees to candidates at $5,000); *Buckley*, 424 U.S. at 35-36, make expenditures in coordination with a federal candidate, *see* § 441a(d) (setting party expenditure limits); *Colorado II*, 533 U.S. at 464 (upholding § 441a(d) only as applied to coordinated expenditures), and spend money on uncoordinated candidate advocacy, both express and nonexpress.

[23] *See infra* Part I.B.2.

circumstances where a donor's contribution to a party is used thereafter to directly benefit a candidate's campaign. Indeed, as I discuss at length in the later in relation to Section 301(20)(A)(iii), *id.*, the record overwhelmingly demonstrates that candidates are aware of who makes the large soft money donations, and in many instances, participate in raising money from them. Furthermore, the record clearly establishes that the public perceives that those large soft money donors receive special access to the legislators and have special influence on the legislative process. *Id.*

The notion that using donations for a federal purpose can implicate corruption is consistent with Congress's definition of "contribution" in FECA: "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office.*" 2 U.S.C. § 431(8)(A)(i) (emphasis added). This definition of contribution was part of FECA when the Supreme Court upheld contribution limitations in *Buckley*, stating that a donation is regulable (that is, a "contribution") because "it is connected with a candidate or his campaign," thus having "a sufficiently close relationship" to the government interest in preventing actual or apparent corruption. 424 U.S. at 78. Additionally, the contention that a party's use of a donation to influence a federal election is conducive to corruption, or its appearance, is also supported by the widely accepted premise that Congress can restrict donations used for party express advocacy as defined by the so-called "magic words" requirement of *Buckley*. Indeed, the plaintiffs concede as much,[24] and this is perfectly consistent

[24] *See, e.g.*, RNC Opp'n Br. at 37 (conceding that *Buckley* and its progeny indicate that contributions to a party may be regulated and subjected to a federal contribution limit "only to the extent the entity uses the contributions for regulable activity," which includes "independent expenditures expressly advocating the election or defeat of federal candidates"); *id.* (stating that money political parties receive for express advocacy "may constitutionally be subjected to a federal contribution limit"); McConnell Opening Br. at 36, 37-38 (admitting that a contribution to be used for activities that exclusively serve to get a candidate elected, like express advocacy, can be corrupting).



with the regulatory scheme that was propagated by the FEC.[25] Surely, if donations used for express advocacy can be limited to prevent corruption, then donations used for candidate advocacy that is tantamount to express advocacy—assuming some minimal "quantum of empirical evidence" of corruption or its appearance, *see Shrink Missouri*, 528 U.S. at 391—should be regulable for the same reason.

The notion that Congress may limit donations based on their use for certain purposes is also consistent with Supreme Court precedent which intimates that donations closely connected to a candidate's campaign—even if they are not direct contributions or coordinated expenditures—raise, at a minimum, the specter of corruption. In *First Bank of Boston v. Bellotti*, the Court rejected a Massachusetts statute prohibiting corporations from making contributions or expenditures to influence the vote on referendum proposals. 435 U.S. 765, 787- 95 (1978). In rejecting the statute, the Court explained that the interests in preventing corruption and thus preserving the integrity of the electoral process were not served by limiting contributions and expenditures that affected referendum discussion. *Id.* at 789-92. The Court stated: "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a

[25] *See* FEC Advisory Op.1995-25 (not allowing use of nonfederal funds to pay for any portion of party express advocacy). One of the reasons that parties should not be able to fund uncoordinated express advocacy with nonfederal funds is that if such a restriction did not exist, corporations and labor unions could simply evade the limitations on their use of their general-treasury funds for express advocacy by funneling those funds through the parties. *See* 2 U.S.C. § 441b; *MCFL*, 479 U.S. at 241-64 (upholding prohibition against using corporate treasuries to fund uncoordinated expenditures for express advocacy).

popular vote on a public issue." *Id.* at 790. Alternatively, one can infer that perceived corruption is likely to be present in cases involving candidate elections.

The extent to which certain uses of donations create the risk of corruption was also at issue in both *California Medical,* 453 U.S. at 193-201, and *Citizens Against Rent Control,* 454 U.S. at 292-300, where the Court considered donations to organizations, not candidates. It is difficult to reconcile these two cases without drawing the conclusion that the Court was primarily concerned with the purpose for which the organizations were using the donations.[26] In *California Medical,* the Court held that Congress can restrict the amount of donations to multicandidate political committees "which advocate[] the views and candidacies of a number of candidates." 453 U.S. at 197. Multicandidate political committees assuredly spend some of their funds on "independent expenditures," as the Court in *California Medical* concedes, *id.* at 195-96, but the Court seemingly concluded that those uncoordinated expenditures, by a "multicandidate" political committee, are made *on behalf of candidates,* whether direct contributions or uncoordinated expenditures. *See* 2 U.S.C. § 441a(a)(4) (defining multi-candidate political committee as a political committee "which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office."). The Court said as much when it dismissed the ACLU's concerns that donation restrictions would hinder the

[26] Not surprisingly, the defendants rely on *California Medical* for the proposition that Congress can regulate *all* donations to political organizations, *see, e.g.,* RNC Opp'n Br. at 36; the plaintiffs equally rely on *Citizens Against Rent Control* for their contention that Congress *cannot* regulate *any* donations to such organizations, *see, e.g.,* Gov't Opening Br. at 65-66. Again, both positions sweep too far and cannot be reconciled without parsing the Supreme Court's rationales in the two cases.



PAC's efforts to collectively express political views. *California Medical,* 455 U.S. at 197 n.17. Restricting contributions to committees like the one at issue in *California Medical,* the Court maintained, is different than efforts to regulate groups expressing common political views. *Id.* In this sense, the nature of the organization—that it is established solely to benefit federal candidates—was enough to conclude that most, if not all, of its contributions and expenditures were for the purpose, and had the effect, of benefitting a federal candidate. Conversely, in *Citizens Against Rent Control,* where the Court found that the City of Berkeley could not restrict donations to political committees that support or oppose ballot propositions, 454 U.S. at 295-300, the organization was established exclusively to advocate on behalf of a public issue, *id.* at 291 (explaining that the issue before the Court was whether donations to associations "formed to support or oppose ballot measures" could be regulated). That the association was formed only to oppose a public issue and that its speech was unrelated to candidates in any way, *id.* at 296-98, led the Court to find that the restriction "does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights," *id.* at 299.

Of course, political parties are unique; they are neither super multicandidate political committees formed entirely to support candidates for federal office nor political associations completely uninvolved in candidate advocacy. Justice Kennedy described political parties this way:

> Political parties have a unique role in serving [the principle of open, robust debate on public issues]; they exist to advance their members' shared political beliefs. . . . A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of

particular elections, candidates are necessary to make the party's message known and effective, and vice versa.

*Colorado I*, 518 U.S. at 628 (Kennedy, J., concurring in the judgment and dissenting in part) (citations omitted).[27] With such varying purposes, national political parties merit a hybrid treatment in regulating the funds donated to them.

Further, *Colorado I* and *Colorado II* do not preclude Congress from regulating donations that directly affect federal elections, even if the parties use those funds independently of the candidates[28] and even if there is no coordination between the donor and the candidate. In *Colorado I*, the Supreme Court merely found that Congress could not limit uncoordinated party *expenditures*. 518 U.S. 617. Indeed, the Court even reiterated that Congress has every power to limit the amount of donations to parties that are "used for independent party expenditures for the benefit of a particular candidate." 518 U.S. at 617. Thus, if anything, *Colorado I* serves to bolster the proposition that Congress can regulate donations used "for the benefit of a particular candidate" because that is where "the greatest danger of

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[27] One Republican National Committee ("RNC") official explained his party this way:

> The RNC achieves [its core principles] through three primary means: (1) promoting an issue agenda advocating Republican positions on issues of local, state, regional, national, and international importance; (2) electing candidates who espouse these views to local, state and national offices; and (3) governing in accord with these views. . . . [T]he RNC often seeks to promote Republican positions on important issues, even in contexts outside elections.

Josefiak Decl. ¶ 22.

[28] *See* J. Henderson Op. at Part IV.D.1.c (arguing that "Congress cannot constitutionally regulate non-federal donations to political parties if the funds are then spent independently of a candidate").



corruption" arises. *Id.*[29] Reading *Colorado I* together with *Buckley, Bellotti, Citizens Against Rent Control,* and *California Medical* leaves one with a clear impression: donations used directly for the purpose of uncoordinated federal activity, like express advocacy, can engender corruption, or the appearance thereof, and are therefore regulable.[30] Finally, *Colorado II*, in which the Supreme Court determined that Congress could limit the amount of coordinated party expenditures, 533 U.S. at 440-65, is relevant because it stands for the proposition that a contribution by the party to the candidate, even absent coordination between the donor and candidate, can be regulated. Thus, donations to political parties used thereafter for purposes that directly affect federal elections, such as candidate "issue ads," even if there is no coordination between the donor and the candidates in advance of the

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[29] The Supreme Court also noted that the opportunity for corruption posed by nonfederal contributions to a party for certain activities, such as supporting state candidates or voter mobilizations efforts, is "at best, attenuated" because "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign." *Colorado I*, 518 U.S. at 616. That observation implies that if soft money were being used "to influence a federal campaign," the opportunities for corruption would be less attenuated, perhaps even palpable. Also, note that the Supreme Court's observation that "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign," *id.*, preceded the 1996 explosion of party candidate advocacy financed with nonfederal funds. *See* Mann Expert Report at 17-21. From 1996 until the enactment of BCRA, the parties used nonfederal funds for the exact purpose that the Supreme Court stated those funds cannot be used for: "to influence a federal campaign." *Colorado I*, 518 U.S. at 616.

[30] *See Jacobus v. Alaska*, 182 F.Supp.2d 881, 889 (D.Alaska 2001) (explaining that there is no appearance of corruption from political party "donations of time, money and services ... not being made for nominating and electing candidates" and holding that "donations to political parties for purposes other than nominating or electing purposes (e.g., issue advocacy, voter registration) may not constitutionally be considered contributions subject to regulation . . . .")

donations to the party, should likewise be regulable. Common sense and the evidence introduced by the defendants support that conclusion. *See infra* Part I.B.2. And, until such time as *Buckley* and its progeny are overruled, allowing such donations to occur without regulation is an affront to a regulatory system that has been blessed by the Supreme Court and in place since the adoption of the 1974 amendments to FECA.

### 3. New FECA Section 323(a) Unconstitutionally Regulates the Use of Nonfederal Funds for Nonfederal and Mixed Purposes

As sure as the evidence, legal precedent, and common sense support Congress's power to regulate the use of nonfederal funds for federal purposes, they do *not* support Congress's effort to regulate nonfederal funds used for nonfederal and mixed purposes. National parties need to raise and use nonfederal funds for a variety of purposes. Sometimes they raise and use nonfederal funds for the nonfederal purpose of contributing to state and local candidates in "off-year" elections when there are no federal candidates on the ballot.[31] Other times they need to raise and

[31] As one RNC official testified: "The RNC's national focus should not be misunderstood as a federal focus. Rather, given the RNC's state- based structure, it is not surprising that the RNC actually focuses many of its resources on purely state and local election activity." Josefiak Decl. ¶ 19. I agree. In 1999 and 2001, the RNC contributed over $9.5 million dollars, using nonfederal funds, directly to state and local candidates. Banning Decl. ¶ 28(a); *see also* Findings 57-59 (explaining, *inter alia*, that five states hold elections in odd-numbered years). For example, the RNC contributed approximately $500,000 to the 1999 Republican gubernatorial candidate in Virginia. La Raja Decl. ¶ 14. In the last two off-year elections, the RNC also transferred over $10 million to state parties and made over $1 million dollars in direct expenditures, bringing the total to $21 million dollars, not including administrative overhead, spent on the two elections where no federal candidates appeared on the ballot. Banning Decl. ¶ 28(a). In 2001 alone, the RNC spent $15.6 million on nonfederal



use funds for mixed purposes that only *indirectly* affect the election of federal candidates, such as generic voter mobilization efforts and genuine issue advertisements.[32] The

activities (contributions to state and local candidates, transfers to state parties, and direct spending). That $15.6 million dollars represented 30 percent of all nonfederal money raised that year by the RNC. *See* Hearing Tr. (Dec. 4, 2002) at 43 (statement of Burchfield). Thus for elections in which there is *no* federal candidate on the ballot, the RNC contributes directly to state and local candidates, trains state and local candidates, and funds communications calling for election or defeat of state and local candidates. *See id.;* Josefiak Decl. ¶ ¶ 19, 41-59; La Raja Decl. ¶ 14; *see also* Bok Cross Exam. at 34-35. Even defendants' expert Thomas E. Mann agreed that donations to a gubernatorial candidate in an odd-numbered year is not something that is intended to affect a federal election. Cross Exam. of Def. Expert Mann at 71.

Of course, the RNC made direct contributions to state and local candidates during even-numbered years as well, *see* Josefiak Decl. ¶ 61, and "sometimes devote[d] significant resources toward states with competitive gubernatorial races even though the races for federal offices [were] less competitive," Josefiak Decl. ¶ 62.

[32] Portions of RNC transfers to state and local parties were used for voter mobilization efforts. One RNC official testified that "RNC transfers of non-federal funds to the state parties play a critical role in subsidizing the activities of the state parties. The state parties depend on these funds to pay for everything from their own administrative overhead to voter mobilization, grass roots organizing, and media." Banning Decl. ¶ 31; *see also* Duncan Decl. ¶¶ 11-12. In 2000, for example, the RNC transferred approximately $25 million in nonfederal funds to the Republican's Victory Plans, which were plans tailored to each state's needs and designed to mobilize voters on behalf of all the candidates on the ticket. Josefiak Decl. ¶¶ 2 40. Money for the Victory Plans was not spent on federal candidate "issue ads," Josefiak Decl. ¶ 31, and was used primarily to benefit state and local candidates, *see* Peschong Decl. ¶¶ 4, 8-9 (stating that "the RNC typically provides a very substantial share of the funding of state victory programs," which are "programs designed to support the entire Republican ticket, and frequently place more emphasis on high profile state-wide races than on federal races, especially when no federal candidate is running state-wide"). Other examples of mixed activities include party newsletters, administrative overhead, training seminars on

defendants do not deny that the national parties use nonfederal funds for both nonfederal and mixed purposes that at the most indirectly affect federal elections. They contend, nonetheless, that nonfederal donations to national parties—*regardless of their use*—create actual or apparent corruption. *See* Intervenors Opp'n Br. at 26. To support that expansion of Congress's power in contravention of the First Amendment rights of the donors and national parties, the defendants would have to demonstrate that using nonfederal funds for either nonfederal or mixed purposes gives rise to either corruption or an appearance of corruption, such that the blanket restriction on nonfederal funds is not overbroad. For the following reasons, they have not done so.

First, the suggestion that the appearance of corruption, let alone actual corruption, exists regardless of any perceived, or actual, benefit to a federal candidate does not comport with the conventional legal understanding of corruption and apparent corruption. The Supreme Court has defined corruption as something more than a quid pro quo arrangement in which a legislator sells his vote for one or more contributions to his campaign, *see, e.g., Colorado II*, 533 U.S. at 440-41, as well as "improper influence" or conduct by a donor that results in a legislator who is "too compliant" with the donor, *Shrink Missouri*, 528 U.S. at 389. Of course, the Supreme Court has also recognized that

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get-out-the-vote activities, and fundraising assistance to state and local parties. *See* Findings 71-99.

Considering the national parties' extensive involvement in so many nonfederal and mixed activities, it is not surprising that the Supreme Court has recognized that political parties do not use all of their donations to affect federal elections, explaining in *Colorado I* that FECA permits unregulated 'soft money' contributions for certain nonfederal and mixed purposes. 518 U.S. at 616 ("We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, or for voter registration and "get out the vote" drives.") (internal citations omitted).



Congress has an equally compelling government interest in preventing the appearance of corruption in the public's mind. *Id.* at 390; *Buckley*, 424 U.S. at 27. The reason for this is simple: like corruption itself, the appearance of corruption undermines the public's confidence in our system of government and frustrates participation in the political process by causing the public to believe elected representatives are not acting independently of the individuals, corporations, and unions who contribute to representatives' campaigns and parties. *Shrink Missouri*, 528 U.S. at 390. Indeed, contribution limits to federal candidates and parties were enacted, and have been upheld by the Supreme Court, to prevent this very perception in the mind of the public. *Id.; Buckley*, 424 U.S. at 23- 35. And it has been Congress's province to set the dollar limit above which this perception starts to ferment. *See Buckley*, 424 U.S. at 30; *Shrink Missouri*, 528 U.S. at 397. Thus, whether the corruption is actual or perceived, every traditional and accepted definition to date depends on the donor conferring, or being perceived as having conferred, a benefit on the candidate in return for something.[33] In *NCPAC*, for example,

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[33] *See, e.g., Buckley*, 424 U.S. at 25; *NCPAC*, 470 U.S. at 497; *see also Black's Law Dictionary* 1261 (7th ed.1999) (translating quid pro quo as "something for something"). Defense expert Donald P. Green explained that corruption, whether quid pro quo or otherwise, "redound[s] to the personal benefit of the candidate seeking to win election." Green Expert Report at 20.

Judge Kollar-Kotelly's belief that, notwithstanding my statements to the contrary, I am narrowly construing the definition of corruption as "something akin to bribery" is, in my judgment, an inaccurate reading of my opinion. *See* J. Kollar-Kotelly Op. at Part III.II.B.2.a.i. That said, regardless of how you describe the acts by an officeholder that are "contrary to their obligations of office," *NCPAC*, 470 U.S. at 497; *see, e.g.*, Intervenors Opening Br. at 43 ("legislative effort") (quoting Green Expert Report at 23-24); Gov't Reply Br. at 15-16 ("access"); *Shrink Missouri*, 528 U.S. at 389 ("politicians too compliant with the wishes of large contributors"), the more telling portion of the corruption equation

the Supreme Court defined corruption in the following way: "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." 470 U.S. at 497. Without financial gain to themselves or money into their campaigns, why would candidates elect to act contrary to their obligations? In short, since donations cannot logically foster corruption, or its appearance, unless the candidate benefits or appears to benefit in some way, donations to a party with no prospect that they will be used to directly affect the candidate's election, cannot, absent substantial evidence to the contrary, give rise to either actual or apparent corruption.

Second, the defendants' contention, in essence, that Congress can regulate the use of soft money donations by national parties for either nonfederal, or mixed, purposes is equally unsupportable by the record and common sense. If a national party uses nonfederal funds to support generic voter registration, or to conduct training seminars for state parties on get-out-the vote activities, the benefit to the federal candidate, assuming his election is even being contested, is attenuated at best, *Colorado I*, 518 U.S. at 616, because it is generic in nature and diluted among a far greater number of state and local candidates. *See infra* Part I.B.1. No credible evidence has been submitted by the defendants that demonstrates that federal candidates either are, or are perceived to be, indebted to donors as a result of such mixed-

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for the purpose of understanding my opinion is the Supreme Court's description of the prospective benefit to the officeholder that supposedly influences him to act: "the prospect of financial gain to themselves or infusions of money into their campaign." *NCPAC*, 470 U.S. at 497. Only an actual or potential benefit of the kind described by the Supreme Court can lure an officeholder into conduct sufficiently corrupting to warrant Congress's regulation.



purpose party activities.[34] Moreover, donations used for generic issue advertisements that may be helpful to both state and federal candidates, another example of a mixed-purpose activity by a party that indirectly affects federal elections in a way unlinked to any particular candidate's election or re-election, also do not foster actual or apparent corruption. Political parties, like many other political organizations, engage in noncandidate-related speech (i.e., genuine or pure issue ads) to influence public opinion on issues of the day.[35]

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[34] Judge Kollar-Kotelly references in her opinion an identical statement by officials of the four national party congressional committees describing as "significant" the effect "that voter identification, voter registration and get out the vote efforts" have on the election of federal candidates. *See* J. Kollar-Kotelly Op. at Part III.II.B.2.b.ii. That "combined" statement is not in my judgment proof *per se* that such efforts (either individually or collectively) *directly* affect federal elections. Indeed, there is no quantitative evidence in the record demonstrating the extent to which voter registration, voter identification, and get-out-the-vote efforts assist federal candidates, as opposed to the far greater number of state and local candidates that appear on the ballot. Determining that, of course, is exacerbated by the practical reality that congressional races in many states are either noncompetitive, or uncontested. Simply stated, there is no way of knowing the election impact value of what is considered "significant" in the eyes of these party officials. Moreover, because these officials do not specify which, if any, of these were "generic" efforts, there is no way of knowing whether the activities to which they are referring were crafted in a way to specifically turn out voters for particular federal candidates. Of course, if they had been, they would not be permissible under this Court's ruling today. *See supra* Part I.A.2 & *infra* Part I.B.2. As a result, I accord limited probative value to these identical statements on this point.

[35] *See* Josefiak Decl. ¶ 91(e) ("The RNC seeks to educate the public about the positions for which the Republican Party stands ."); La Raja Decl. ¶ 16 ("Political parties use nonfederal funds to develop and disseminate political messages."); *Colorado I*, 518 U.S. at 616 (recognizing that "a political party's independent expression . . . reflects its members' views about the philosophical and governmental matters that bind them together"); *id.* at 629 (Kennedy, J., concurring in part and dissenting in part) (explaining that political parties "exist to advance their members' shared political beliefs")

Just recently, for example, the RNC funded a generic issue advertisement on the radio that touted the Republican's education proposal. It broadcasted the following:

> Male: Every child can learn . . .
> Female: . . . and deserves a quality education in a safe school.
> Male: But some people say some children can't learn . . .
> Female: . . . so just shuffle them through.
> Male: That's not fair.
> Female: That's not right.
> Male: Things are changing. A new federal law says every child deserves to learn.
> Female: It says test every child to make sure they're learning and give them extra help if they're not.
> Male: Hold schools accountable. Because no child should be in a school that will not teach and will not change.
> Female: The law says every child must be taught to read by the 3rd grade. Because reading is a new civil right.
> Male: President Bush's No Child Left Behind Law.
> Female: The biggest education reform and biggest increase in education funding in 25 years.
> Male: Republicans are working for better, safer schools . . .
> Female: . . . so no child is left behind.
> Male: That's right . . . Republicans.
> Anncr: Learn how Republican education reforms can help your children. Call .... Help President Bush and leave No Child Behind.

Josefiak Decl. ¶ 91(e) & Exhibit X. While pure issue advocacy, like the above advertisement, can *indirectly* affect a federal election,[36] it is unlikely, and there is no evidence to

[36] *See Buckley*, 424 U.S. at 42-43, 43 n.50 ("Public discussion of public issues . . . tend naturally and inexorably to exert some influence on voting at elections." (quoting *Buckley v. Valeo*, 519 F.2d 821, 875 (D.C. Cir. 1975))).



the contrary, that candidates will feel indebted to those who helped fund such advertisements. Moreover, the fact that state and local parties would still be able to use nonfederal money to engage in genuine issue advocacy[37] serves to undermine Section 323(a)'s complete ban on national parties being able to do the same.[38] Lastly, if the above analysis is true with regard to the inability to demonstrate even an appearance of corruption when nonfederal funds are being used for mixed purposes that indirectly affect a federal election, it is even more true when the purpose is nonfederal and has no effect on any federal candidate's election or re-election. In short, the

[37] BCRA § 101; FECA § 323(b); 2 U.S.C. § 441i(b)(1); BCRA § 101; FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). The state and local parties could also presumably use nonfederal funds for all other mixed activities not included within Section 301(20)(A)'s definition of "federal election activity."

[38] In *United States v. National Treasury Employees Union ("NTEU")*, 513 U.S. 454, 473-75, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), the Supreme Court rejected a complete ban on honoraria for government employees because, in part, Congress exempted certain speeches that had no nexus to the government employment, explaining that the exemption "cast serious doubt on the Government's submission" that the honoraria was so "threatening ... as to render the ban a reasonable response to the threat." *Id.* at 473. The Court thus found that Congress's exemption undermined application of the ban to speeches without a connection to government employment: "[a]bsent such a nexus, no corrupt bargain or even appearance of impropriety appears likely." *Id.* at 474; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (observing that exemptions "may diminish the credibility of the government's rationale for restricting speech in the first place").

Further, Congress's decision to only restrict state and local parties from using nonfederal funds for candidate advocacy, *see* BCRA § 101; FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii), reinforces the premise that actual or apparent corruption manifests only when there is a nexus to a federal candidate.

defendants have provided no legal basis to restrict a national party's use of nonfederal funds for nonfederal purposes.

Third and finally, the defendants' contention that candidates, who raise soft money donations for their national parties, regardless of their subsequent use, are indebted to the donors due to "internal party benefits" they subsequently receive for raising the nonfederal donations,[39] is equally tenuous from both a theoretical and an evidentiary standpoint, and, in any event, Section 323(a) remains insufficiently tailored based on that justification to pass constitutional muster. The defendants' contention is theoretically flawed because it proceeds from the premise that the corruption, or appearance of corruption, necessary to warrant congressional intervention can be satisfied by a federal candidate receiving a benefit other than personal financial gain or direct assistance, monetary or otherwise, to his election effort. The Supreme Court has never defined corruption, or its appearance, in those terms. As stated previously, the only benefit the Supreme Court has based a finding on is "the prospect of financial gain to themselves or infusions of money into their campaigns." *NCPAC*, 470 U.S. at 497.[40] Even if the Court did, however, bless the notion that a nonmonetary benefit from someone other than the donor could, under the right circumstances, give rise to an

[39] *See* Intervenors Opp'n Br. at 26-27 (explaining that "without regard to how soft money is ultimately spent, . . . the parties reward [federal candidates and officeholders] for raising it" and that "success in the party reinforces stature in the government because federal officeholders attain leadership positions in Congress partly as a result of their success as fundraisers" (citing Bumpers Decl. ¶¶ 7-9)).

[40] *Cf.* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L.Rev. 1281, 1313 (1994) ("If candidates did not stand to gain much for their own campaigns from the money so raised, one doubts that party loyalties (or pressure) would lead to excessive diversion of candidate time to [soft money] fund-raising.").



indebtedness that the public could perceive as "corrupting" its legislator's independence, there is no evidence on this record that such corruption has either occurred or is perceived by the public to exist. The evidence relating to the appearance of corruption, such as it is, only establishes that the public believes there is a connection between large donations to national parties and the influence and access the pubic believes the donors receive. *See infra* Part I.B. It does not, however, establish that this connection exists independent of how the parties use the funds. If anything, the public's regular exposure to so-called "issue ads" sponsored by the parties and crafted to help their candidates,[41] combined with its lack of knowledge of the difference between soft and hard money and its lack of knowledge of the campaign finance regulations (both of which have been demonstrated),[42] should lead this Court to reasonably infer that the public believes that these donations are used in whole, on in part, by the parties to directly help their candidates. It is that perceived benefit, in my judgment, that gives rise to the public's view that officeholders, either out of gratitude, or in hope of similar future contributions, provide increased access and influence to those donors. And in light of the utter absence of evidence on the record establishing any other reason that the public believes accounts for federal officeholders granting increased influence and access to those who give large donations to their party, this Court should infer the same. In any event, the defendants' argument is flawed because their supposed internal-party-benefit rationale was not even relied upon by Congress to limit the national parties use of nonfederal funds. If it had been, Congress would have only restricted

[41] These advertisements clearly show who funds the advertisements, stating in no uncertain terms at the end of each advertisement: "Paid for by the Republican National Committee" or "Paid for by Republican Party of Florida." *See, e.g.*, Findings 45 & 46.

[42] *See* Findings 264-67.

nonfederal funds that federal candidates themselves solicited. Thus, Section 323(a)'s sweeping restriction, even if acceptable theoretically and factually based on the internal-party-benefit rationale, is not sufficiently tailored to "alleviate [the] harm in a direct and material way." *Turner Broadcasting Sys., Inc. v. FCC ("Turner I")*, 512 U.S. 622, 664 (1994).[43]

In sum, conduct which only indirectly affects a federal election requires a greater degree of evidence of corruption, or appearance thereof, to warrant congressional regulation. Thus, in the absence of sufficient proof to warrant expanding FECA in this direction, Congress may only prohibit the national parties from using nonfederal money for federal purposes such as those defined in Section 301(20)(A)(iii), which are clearly designed to directly affect federal elections. The use of nonfederal funds for nonfederal or mixed purposes, which at the most indirectly affect federal elections, is simply not regulable by Congress because it does not give rise to corruption or the appearance of corruption. Thus Section 323(a)'s complete ban on the use of nonfederal funds is not closely drawn to serve the designated government interest.

4. Severability of New FECA Section 323(a)

Because Section 323(a) prohibits *all* uses of nonfederal funds by national parties, and because I only uphold Congress's power to prohibit the use of nonfederal funds for federal purposes (as defined in Section 301(20)(A)(iii)), *see*

[43] It has also been suggested by one of the defendants' witnesses that Members of Congress raising soft money donations receive the additional benefit of helping their parties retain control of Congress. *See* Hickmott Decl. Exhibit A ¶ 18. Even assuming, *arguendo*, that this benefit is not too attenuated to establish a sense of indebtedness to the large party donors, it is severely undercut if the parties cannot, as we have held, use large nonfederal donations to directly assist the election and re-election of their members. *See supra* Part I.A.2 & *infra* Part I.B.2.



*infra* Part I.B.2, a considerable issue is presented as to whether we can isolate and uphold that prohibition from the remaining undefined, unconstitutional prohibitions in Section 323(a) in a manner consistent with both the severance clause and Supreme Court precedent. For the following reasons, I believe we can and should.

It is a "cardinal principle" of statutory construction to save as much of a statute as possible. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (Hughes, C.J.).[44] Indeed, Congress itself in Section 401 of BCRA provided us with a severability clause which directed us to do as much.[45] In attempting to save a statute, however, the Supreme Court has made it clear that a court must take great pains to avoid

[44] *See also Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting *Harper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895))); *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) ("[A] court should refrain from invalidating more of the statute than is necessary."); *Morse v. Republican Party of Va.*, 517 U.S. 186, 242, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (Scalia, J., dissenting) (explaining that a court is required to find a "limiting construction or partial invalidation" that will "remove the seeming threat or deterrence to constitutionally protected expression" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973))); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (observing that a statute should be "declared invalid to the extent it reaches too far, but otherwise left intact").

[45] The severability clause states: "If any provision of this Act or amendment made by this Act, or the application of a provision or amendment to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the amendments made by this Act, and the application of the provisions and amendment to any person or circumstance, shall not be affected by the holding." BCRA § 401.

"rewriting" the statute.[46] Thus, a severability clause, due in part to separation of powers concerns, is merely an "aid," not a "command," to the judiciary. Nonetheless, the Supreme Court has frequently found statutory provisions unconstitutional (or constitutional) as to particular applications without invalidating (or validating) the entire provision.[47] In the campaign finance arena, the Supreme Court in *Colorado I* and *Colorado II* did not object to severing applications of Section 441a(d), a FECA provision that caps how much

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[46] *See Chapman v. United States*, 500 U.S. 453, 464, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (Rehnquist, C.J.) ("The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" (quoting *U.S. v. Monsanto*, 491 U.S. 600, 611, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989))); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of statute . . . or judicially rewriting it." (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (internal quotations omitted))); *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (explaining any attempt "to rewrite language enacted by the legislature . . . while purporting to be an exercise of judicial restraint, would trench upon the legislative powers vested in Congress by Article I, § 1, of the Constitution" (citing *Heckler v. Mathews*, 465 U.S. 728, 741-42, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984))); *In re Espy*, 800 F.3d 501, 505 (D.C.Cir.1996).

[47] *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 763, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (rejecting a broad ban on solicitation only as applied to the business context); *Brockett*, 472 U.S. at 502-07, 504 (partially invalidating moral nuisance law "only insofar as the word 'lust' is to be understood as reaching protected materials"); *United States v. Grace*, 461 U.S. 171, 175, 183, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (invalidating prohibition of speech activities on Supreme Court grounds "as applied to the public sidewalks"); *see also NTEU*, 513 U.S. at 487 (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing examples).



political parties can spend.[48] In *Colorado I*, the Supreme Court invalidated Section 441a(d) as applied to uncoordinated, or independent, expenditures. 518 U.S. at 613-20. It then remanded the question of whether Section 441a(d)'s application to coordinated expenditures was constitutional, directing the lower courts to determine "whether or not Congress would have wanted [Section 441a(d)'s] limitations to stand were they to apply only to coordinated, and not to independent, expenditures." *Id.* at 625-26. On remand the district court found that Section 441a(d)'s application to coordinated expenditures was severable from its application to uncoordinated expenditures. 41 F. Supp. 2d 1197, 1206- 07 (D. Co. 1999). The district court found the two applications severable because of the "strong" severability provision, which is almost identical to the provision at issue here, and because there was "no evidence" that Congress would not have rejected Section 441a(d) as applied to coordinated party expenditures. *Id.* at 1207. Both the Tenth Circuit and the Supreme Court, noting that the severability argument was not renewed upon appeal, let the district court's decision stand. *Colorado II*, 533 U.S. at 440 n.5; *FEC v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1225 n.3 (10th Cir. 2000). In the end, though the language in Section 441a(d) makes no reference to coordinated or uncoordinated expenditures, the Supreme Court upheld certain applications of the provision (coordinated party expenditures) but invalidated other applications (uncoordinated party expenditures).

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[48] Specifically, Section 441a(d) states that political parties "may not make any expenditure in connection with the general election campaign of a candidate in Federal office in a State who is affiliated with such party which exceeds" $10,000 in a House campaign and, in a senatorial campaign, the greater of $20,000 or "2 cents multiplied by the voting age population of the State." 2 U.S.C. § 441a(d)(3).

Typically the Supreme Court invalidates specific applications, while letting others stand, when it can confidently discern congressional intent. In one recent case where the Supreme Court refused to limit the application of a statute which banned all honoraria to government employees, *United States v. National Treasury Employees Union ("NTEU")*, 513 U.S. 454, 479 (1995), it did so because it was faced with considerable uncertainty as to how Congress would have defined the honoraria restriction if it had known the complete ban on honoraria would have been rejected as unconstitutional. *Id.*[49] For a number of reasons, we do not have that problem here.

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[49] The Court in *NTEU* shied away from a limiting construction, in part, because it could not be sure that it "would correctly identify the nexus Congress would have adopted in a more limited honoraria ban." 513 U.S. at 479. "[D]rawing one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn, involves a far more serious invasion of the legislative domain." *Id.* at 479 n. 26. The Court echoed this concern in *Reno v. ACLU*, where it refused to apply a tailoring construction to provisions seeking to protect minors from "indecent" and "patently offensive" internet communications. 521 U.S. 844, 883-88, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). It found that, in a facial challenge, a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Id.* at 884 (quoting *Virginia v. American Bookseller's Ass'n., Inc.*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)). The Supreme Court suggested that a statute is "readily susceptible" for a limiting construction when the statute provides "guidance ... for limiting its coverage" and "the text or other source of congressional intent identified a clear line that this Court could draw." *Reno*, 521 U.S. at 884.

Justice O'Connor, in her dissent in *NTEU*, lamented that "a court should not [ ] throw up its hands and despair of delineating the area of unconstitutionality" and that it is "inconsistent with congressional intent to strike a greater portion of the statute than is necessary to remedy the problem at hand." 513 U.S. at 486-89 (O'Connor, J., concurring in the judgment in part and dissenting in part); *see also id.* at 501-03 (Rehnquist, C.J., dissenting) (describing the majority's remedy as an "O. Henry ending").



First, with regard to Title I, Congress's intent, based on both the severability clause and the text of the statute, is unambiguous. The clause itself, of course, directs that the Court save "the application of the provisions ... to any person or circumstance." BCRA § 401. However, as stated previously, such a clause only creates a presumption of severability.[50] It does not relieve this Court of its obligation to determine if the limiting construction of Section 323(a) can stand alone, and if Congress would have enacted such a construction knowing that its broader position would be held unconstitutional.[51] With regard to both the former and the latter, Congress, by defining "federal election activity" in Section 301(20)(A)(iii) to include certain communications which directly affect federal elections and by constitutionally prohibiting state parties from engaging in such activity in Section 323(b), has unequivocally indicated its intent that such activity—as defined—would be among the undefined uses of nonfederal funds that national parties were similarly being prohibited from engaging in under Section 323(a). To conclude otherwise would be to turn a blind eye to an obvious

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[50] *See Reno*, 521 U.S. at 884 n. 49 (explaining that "[i]n part because of separation-of-powers concerns, we have held that a severability clause is 'an aid merely; not an inexorable command'" (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S.Ct. 323, 68 L.Ed. 686 (1924))); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987); *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C.Cir.1990) (agreeing that "'the ultimate determination of severability will rarely turn on the presence or absence'" of a severability clause (quoting *United States v. Jackson*, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968))).

[51] *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (quoting *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062 (1932))); *Buckley*, 424 U.S. at 108-09 (same).

reason why Sections 323(b) and 301(20)(A) were written in the first place: to prohibit donors (especially corporations and unions) and the national parties from circumventing Section 323(a) by funneling soft money through state and local parties for Section 301(20)(A) purposes.[52] By limiting the prohibited uses of nonfederal funds by national parties in Section 323(a) to communications of the kind defined by Congress *in its own words* in 301(20)(A)(iii), I am neither employing a saving construction that "rewrites" Section 323(a), nor ignoring Congress's clear intention to save an implicit feature of that section *consistent* with BCRA's severance clause admonition.

Finally, by applying Section 301(20)(A)(iii), which I hold to be constitutionally acceptable for Section 323(b), *see infra* Part I.B.2, to define the prohibited conduct in Section 323(a), I avoid the Supreme Court's additional concern of creating a

[52] *See, e.g.*, 145 Cong. Rec. S2138 (Mar. 20, 2002) (statement of Sen. McCain) ("Closing the [state and local party] loophole is crucial to prevent evasion of the new federal rules."); 147 Cong. Rec. S2928 (Mar. 27, 2001) (Sen.Schumer) ("[R]egulating soft money without dealing with the soft money that goes to State parties is like the person who drinks a Diet Coke with his double cheeseburger and fries: It does not quite get the job done."); 145 Cong Rec. H8275 (Sept. 14, 1999) (statement of Rep. Kaptur) (stating that banning nonfederal funds for national parties but allowing it for state parties is "like bolting the front door to protect yourself from burglars while hanging a neon sign on the back door that says, 'Come on in' "); 144 Cong. Rec. H7323 (Aug. 6, 1998) (statement of Rep. Roukema) (stating that allowing state parties to use federal funds creates a "loophole large enough to drive an armored car stuffed with campaign cash through."); Brock Decl. ¶ 8; Rudman Decl. ¶ 19; *see also* Gov't Opening Br. at 53 ("Section 323 contains several interrelated provisions designed to eliminate solicitation, contribution, and use of unregulated soft money by federal candidates, federal officeholders, and national political parties."); Gov't Opening Br. at 103 ("Any successful attempt to limit national party soft money activity must perforce prevent easy evasion through surrogates such as state and local parties.") (citing Mann Expert Report at 31).



definition the constitutionality of which has not been decided.[53] Accordingly, for all of the above reasons, I find that Section 323(a)'s implicit prohibition on national parties to use nonfederal money to fund communications of the kind defined in Section 301(20)(A)(iii) is constitutionally severable from its remaining unconstitutional applications.

### B. New FECA Sections 323(b) and 301(20)(A): Restrictions on Nonfederal Funds for "Federal Election Activities"

Unlike Section 323(a)'s total ban on the use of nonfederal funds by national parties, Section 323(b) only prohibits state parties from using nonfederal funds for certain "federal election activities," BCRA § 101; FECA § 323(b); 2 U.S.C. § 441i(b)(1), which it defines in Section 301(20)(A). BCRA § 101; FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). Thus, in order to assess the constitutionality of the restraint on the state parties in Section 323(b), we have to simultaneously assess the constitutionality of Section 301(20)(A)'s definition of federal election activity.

Section 301(20)(A) defines federal election activity to include: (1) voter registration activity during the period 120 days before a regularly scheduled federal election; (2) "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot"; (3) "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports

[53] *See NTEU*, 513 U.S. at 479 (refusing to adopt a limiting construction, in part, because its judicial obligation was to avoid "independent constitutional concerns"); *see also Ashwander v. TVA*, 297 U.S. 288, 346-47, 56 S.Ct. 466, 80 L.Ed. 688 (1936) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Comm'rs*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885))).

a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)"; and (4) services provided by a state or local party committee employee who spends more than twenty-five percent of that individual's compensated time "on activities in connection with a Federal election." BCRA § 101; FECA § 301(20)(A); 2 U.S.C. § 431(20)(A).

Only Section 301(20)(A)(iii), however, describes conduct which is targeted exclusively at federal elections and which directly affects federal elections. Accordingly, for the reasons set forth below, I find that Section 323(b) and Sections 301(20)(A)(i), (ii), and (iv) are substantially overbroad in that they seek to restrain state parties from using nonfederal funds for election activities, which only indirectly affect federal elections, and thus do not give rise to the appearance of corruption necessary to warrant congressional intervention. As to Section 301(20)(A)(iii), however, I find that it is constitutionally permissible because, by contrast, it focuses on election activities that directly affect federal elections and as such, give rise to the appearance of corruption necessary to warrant Congress's restraint on the First Amendment rights of the donors.

1. New FECA Sections 323(b) and 301(20)(A)(i), (ii), and (iv)

Section 323(b) is premised, in part, on the congressional belief that certain mixed-purpose activities by state parties, when funded with nonfederal funds, sufficiently affect federal elections that they give rise to an appearance of corruption between the donors and the candidates whose campaign receives the benefit of these activities. I disagree. Setting aside the considerable issue of whether the Elections Clause,



U.S. Const. art. I, § 4; *Buckley*, 424 U.S. at 13 & n.16,[54] can be fairly read to allow Congress to regulate state party activities such as those defined in Sections 301(20)(A)(i), (ii), and (iv), *see* CDP/CRP Opening Br. at 20-27, the justification and evidence submitted here fail to establish that those provisions serve a sufficient government interest to justify an infringement on First Amendment rights.

The Supreme Court pointed out in *Colorado I* that "the opportunity for corruption posed by" nonfederal funds for mixed-purpose activities like voter registration and get-out-the-vote "is, at best, attenuated." 518 U.S. at 616. Though dictum it may be, it is particularly telling. *See Central Green Co. v. United States*, 531 U.S. 425, 431 (2001) ("dicta 'may be followed if sufficiently persuasive' but are not binding" (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935))). One can infer from the Supreme Court's plain statement that the opportunity for corruption is less because there is no clear link between donations used for these predominantly generic activities and whatever benefit accrues to the candidate.

When nonfederal funds go to political parties, not candidates, and are spent for purposes that do not directly affect federal elections, there is less concern about donors having quid pro quo arrangements with candidates. Indeed, given that Section 301(20)(A)(iii) prevents communications that promote federal candidates, the activities defined in Sections 301(20)(A)(i) and (ii) are necessarily "generic" or specific only to a nonfederal candidate: that is, these activities are not directed at a specific federal candidate.[55] Conversely,

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[54] Because I find these sections and Section 323(a) (aside from nonfederal funds used for federal activities) unconstitutional based on the First Amendment, I need not reach either the federalism or equal-protection claims.

[55] Under the pre-BCRA regime, political parties could not use any nonfederal funds if the voter mobilization effort supported or opposed "a

such activities potentially assist a considerably larger number of state and local candidates that greatly outnumber the one, or possibly two, federal candidates on the ballot,[56] many of whom invariably run unopposed or in clearly noncompetitive races. There is also evidence that state and local parties undertake voter mobilization efforts principally for state and local candidates,[57] mostly from nonfederal money they raised

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specific candidate." *See* 11 C.F.R. § 106.5(a)(2)(iv). And in BCRA, generic campaign activity is defined as "a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate," BCRA § 101(b); 2 U.S.C. 431(21); 11 C.F.R. § 100.25 (67 Fed.Reg. 49,111 (July 29, 2002)), and "get-out-the-vote" is defined as "contacting registered voters . . . to assist them in engaging in the act of voting," *regardless of a reference to a federal candidate*. *See* 11 C.F.R. § 100.24(a)(3). In any event, get-out-the-vote or voter registration activities employing a "public communication," which is defined broadly to include everything from telephone banks to mass mailings, *see* BCRA § 101(b); 2 U.S.C. 431(22); 11 C.F.R. § 100.26, that promotes or attacks a clearly identified federal candidate, *see* BCRA § 101; FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii), would not be allowed if Section 301(20)(A)(iii) is upheld. *See also* Bowler Decl. ¶ 20(b) (noting that California Democratic Party's ("CDP's") direct mail programs typically do not mention federal candidates); Erwin Aff. ¶ 9 (explaining that "[t]he overwhelming amount of [voter registration] activity is 'generic' voter registration activity urging potential registrants to 'Register Republican'").

[56] *See* Bowler Decl. ¶¶ 13, 15 (explaining that in the 2002 cycle, where the only federal office on the California ballots was a congressional race, administrative expenses were required to be allocated 12.5 percent federal and 87.5 percent nonfederal based on the ballot composition formula). California holds elections for 120 legislative officers, eight statewide-elected officers, and four members of the State Board of Equalization. It also holds elections for judicial offices, local offices, and ballot measures at both the state and local levels. *See id.* ¶ 13; Erwin Aff. ¶ 5.

[57] *See* Findings 113-37, 150-54. The CDP spent more money for voter registration in 1998, a year with eight statewide elections, than in 2000, a presidential election year. Bowler Decl. ¶ 20.a; *see also* Erwin Aff. ¶ 14.a (stating that "voter registration activities are primarily driven by the desire to affect State and local races").



on their own,[58] and in elections where the federal candidates are practically uncontested.[59]

In light of this focus on state and local candidates, there is every reason for this Court to doubt whether the federal candidates themselves would view such generic activities by state and local parties as sufficiently helpful to their campaigns as to warrant even a token sense of indebtedness to the soft money donors to the political parties. The evidence, such as it is, regarding Sections 301(20)(A)(i) and (ii) activities fails to demonstrate either the degree of effect such activities have on the federal candidate's re-election, or the existence of a public perception that donations used to fund such efforts create a sense of indebtedness between the federal candidate and those who make large donations to the party. That there is no evidence that the public perceives corruption in these circumstances is not surprising. Since the public would expect state parties to engage in such voter mobilization efforts for the benefit of all of its candidates, we can, and should, reasonably infer that the public would

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[58] *See also* Bowler Rebuttal Decl. ¶¶ 3-4 (explaining that the CDP pays for much of its voter registration and get-out-the-vote activities with money raised by the state party); Bowler Decl. ¶ 12 (explaining that in the 1999-2000 election cycle, the CDP raised $15,617,002 in nonfederal funds, which it used to fund state and local activities). The amount of nonfederal money the California Republican Party ("CRP") and CDP raised themselves is much more than the nonfederal funds they received from national-party transfers. CDP/CRP 1171 (in the 1999-2000 election cycle, which was a presidential election cycle, only 19.1 percent of all CRP nonfederal money was from national-party transfers); CDP/CRP 35, 37, 39 (in 2000, only 36 percent of all CDP nonfederal money was from national-party transfers). While the state and local parties may spend most of their nonfederal national-party transfers on candidate advocacy, they spend very little of their overall nonfederal funds on such activities.

[59] For example, the CDP actively registered over 300,000 Democratic voters throughout California during 2002 even though there was only one competitive congressional race out of 52 races. *See* Bowler Decl. ¶ 20.a; Torres Decl. ¶ 8.

correspondingly view a federal candidate's sense of indebtedness, if any, to be *diluted* among the numerous state and local candidates who equally benefit from these activities. *See* Feingold Dep. at 126- 27 (acknowledging that soft money being used for generic campaign activity is less likely to create an appearance of corruption). Such uncertainties are hardly a sufficient basis from which to allege that precluding state and local parties from using nonfederal funds for mixed-purpose activities serves the government interest in preventing corruption, or its appearance. Thus, in the absence of a substantial evidentiary showing to the contrary, it is "mere conjecture," *Shrink Missouri*, 528 U.S. at 392, by the defendants that an appearance of corruption arises from donations to state parties, or transfers from national parties, that are used for these generic or noncandidate-specific activities set forth in Sections 301(20)(A)(i) and (ii).

Finally, even if the defendants had demonstrated that some mixed-purpose activities do somehow create an appearance of corruption, Sections 301(20)(A)(i), (ii), and (iv) are not sufficiently tailored to be constitutionally acceptable. By limiting donations for so many unmistakably noncorrupting activities, like donations for voter registration on behalf of state candidates, these sections extend too far. It is simply not enough to claim that just because the use of a donation has *some* effect on a federal election, it must be completely funded with federal funds.[60] To reach such a conclusion would inevitably sweep in too many activities that deserve First Amendment protection. Section 301(20)(A)(iv)'s

[60] *Cf.* Robert Post, *Regulating Election Speech Under the First Amendment*, 77 Tex. L.Rev. 1837, 1842 (1999) ("It is surely the case that election speech affects elections, but so does all public discourse. If all that were necessary to bring speech within the authority of a managerial domain were that the speech produce effects on the domain, nothing much would be left of public discourse.").



percentage based definition of the amount of time a party official must spend in connection with a federal election, BCRA § 101; FECA § 301(20)(A)(iv); 2 U.S.C. § 431(20)(A)(iv), provides the starkest example of this insufficient tailoring. If a state party employee spends 26 percent of his compensated time "in connection with a Federal election," then his entire salary must be paid using federal funds. Clearly, 74 percent of the employee's compensated time, which has no relation whatsoever to a federal election, is being regulated. There is no adequate basis in the record before us to determine whether the nature of his conduct sufficiently impacts the election to give rise to an appearance of corruption between the donors who may be funding his efforts through the state party and the candidate receiving the benefit of his services. Thus, even if Sections 301(20)(A)(i), (ii), and (iv) served to prevent some appearance of corruption, they are not drawn closely enough to survive scrutiny.

2. New FECA Section 301(20)(A)(iii)

As I indicated previously, Congress has the power to require both national and state parties to use only federal money for election activities that directly affect federal elections.[61] Section 301(20)(A)(iii) focuses on one such type of activity: "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate *for that office*." BCRA § 101; FECA

[61] This analysis of Section 301(20)(A)(iii) is equally applicable to national, state, and local parties. Considering the coordination and financial transfers between the various party levels and that parties at all levels work on behalf of national, state, and local candidates, it is unrealistic to view the parties differently simply based on the fact that one is labeled "national" and another "state." It is the nature of the activities they undertake rather than they label they assume that defines the type of allowable regulations.

§ 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii) (emphasis added). Judge Henderson concludes in her opinion that the Supreme Court in *Buckley* required certain "magic words" that specifically advocate the election or defeat of a candidate in order for a communication to be the type of advocacy regulable by Congress. All other communications, even if they directly affect a federal election, from her perspective, are not regulable.[62] I disagree. For the same reasons, in part, set forth by Judge Kollar-Kotelly in her opinion on Title II, I believe that *Buckley* did not set forth a "bright-line test." *See* J. Kollar-Kotelly Op. at Part III.I.C.1. But, even if the Supreme Court did set forth a bright-line test for Congress's regulation of *expenditures by nonparties* in *Buckley*, 424 U.S. at 39-51, that rationale is not necessarily applicable to, and binding on, Congress's power to regulate *donations to political parties* under BCRA.

Therefore, the question before this Court is not so much whether Congress can regulate the use of nonfederal funds for uncoordinated, nonexpress advocacy that directly affects federal elections, but whether Congress has defined such nonexpress advocacy in Section 301(20)(A)(iii) in a way that will withstand constitutional scrutiny. For the following reasons, I have concluded that Congress not only can regulate uncoordinated, nonexpress advocacy which directly affects federal elections, but has defined that nonexpress advocacy in Section 301(20)(A)(iii) in a way that is sufficiently tailored to serve the government interest of preventing actual or apparent

[62] *See, e.g.*, J. Henderson Op. at Part IV.D.1.a & Part IV.D.1.b (referring repeatedly to "protected issue advocacy"). I do not believe we should assume that just because the party advertisements are currently funded with nonfederal money that they, by definition, have a nonfederal purpose. *See* J. Henderson Op. at Part IV.D.1.c.



corruption, and in a way that is not unconstitutionally vague.[63]

In defining "candidate advocacy" as it did, Congress chose to couple two concepts together in order for communications to qualify as regulable: (1) the identification of a candidate for a federal office; and (2) words that promote, oppose, attack, or support that candidate *for that office*. BCRA § 101; FECA § 301(20)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). Therefore, unlike genuine issue advocacy, which both national and state parties have every right to participate in with nonfederal funds, and which help all party candidates in a generic sense, Congress in this definition was seeking to focus on parties using nonfederal funds for communications intended to directly help a specific federal candidate. Because such assistance is focused ona specific candidate,[64] it is

[63] Any attempt to regulate communications that directly affect federal elections, like those regulated in Section 301(20)(A)(iii), does not exceed Congress's authority to regulate federal elections under the Elections Clause, *see* U.S. Const. art I., § 4. For this reason, I do not need to address further the plaintiffs' federalism claims in relation to Section 301(20)(A)(iii). I also reject the plaintiffs' equal-protection challenge because political parties are unique actors in the political system, *see supra* note 27 and accompanying text, such that Congress is warranted in treating contributions to them differently. *See California Medical*, 453 U.S. at 200-01 (rejecting equal-protection challenge to contribution limits for multicandidate political committees, stating that "[t]he differing restrictions placed on [different entities] reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process"). Finally, I concur with Judge Henderson's discussion of the Thompson Plaintiffs' equal- protection claim. *See* J. Henderson Op. at Part IV.D.4.

[64] *See, e.g., Colorado II*, 533 U.S. at 458 ("I understood that when I raised funds for the [Democratic Senatorial Campaign Committee ("DSCC") ], the donors expected that I would receive the amount of their donations multiplied by a certain number that the DSCC had determined in advance, assuming the DSCC has raised other funds." (quoting Senator Timothy Wirth)); Simpson Decl. ¶ 7 ("Members know that if they assist

natural for that candidate to feel indebted towards those whose donations funded the communication, even if he does not know exactly which soft money donors' funds actually made it possible. Concomitantly, it is natural for the public to perceive that those whose large soft money donations funded the national and state parties' communications are not only known by the parties' staffs, but by the federal candidates who directly benefitted from the donations.

The evidence submitted by the defendants overwhelmingly corroborates these common sense conclusions. The record is clear that many, if not most, of the party so-called "issue ads" refer to a specific federal candidate.[65] And the evidence also demonstrates that the advertisements are designed to, and do, support or oppose those candidates for that office.[66] To illustrate one extreme of this genre: in 1996, the Republican National Committee ("RNC") ran a supposed "issue ad" called "The Story" which requires only a quick reading to discern its true purpose and effect.

> Audio of Bob Dole: We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in. Voice Over: Bob Dole grew up in Russell, Kansas. From his parents he

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the party with fundraising, be it hard or soft money, the party will later assist their campaign. . . . Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates ."); McCain Decl. ¶ 7 ("[P]arties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' re-election."); *see also* Findings 31-35.

[65] In the 1998 election, $24.6 out of $25.6 million spent by political parties on advertisements were spent on advertisements that referred to a federal candidate. Out of 44,485 advertisements, 42,599 advertisements referred to a specific candidate. *See* Krasno & Sorauf Expert Report at tbl. 1.

[66] *See* Findings 36-52.



> learned the value of hard work, honesty and responsibility. So when his country called . . . he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.
>
> Audio of Bob Dole: I went around looking for a miracle that would make me whole again.
>
> Voice Over: The doctors said he'd never walk again. But after 39 months, he proved them wrong.
>
> Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.
>
> Voice Over: Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.
>
> Voice of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Fabrizio Dep. Exhibit 2; McCain Decl. ¶ 15; Huyck Decl. ¶ 3; Fabrizio Dep. at 49-55. Though this advertisement transparently was intended to assist Senator Dole's campaign, it was funded in part with nonfederal funds. It is hard to disagree with Senator Levin, who described the advertisement this way: "It's not an ad about welfare or wasteful spending; it is an ad about why should we elect that particular nominee."[67]

Another and more typical form of sham issue advertisement run by parties is a candidate-centered ad that focuses on the positions, past actions, or general character

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[67] 145 Cong. Rec. S12747 (Oct. 18, 1999) (Sen.Levin); *see also* Memorandum from Charlie Nave to Haley Barbour (May 28, 1996) (explaining that the Dole advertisement was tested to see its effect on Senator Dole's election).

traits of a given federal candidate; contrasts them to the party's view of the proper outlook on those issues; and encourages the viewers to contact the candidate to ostensibly inquire why he/she is taking those positions or actions. *See* Findings 45 & 46. In the 2000 election, for example, the National Republican Congressional Committee and the Florida Republican Party ran television advertisements criticizing Linda Chapin, the Democratic candidate for Congress:

> Announcer: Linda Chapin. Hard on taxpayers. Soft on convicts. Chapin raised taxes on your utilities, pushed to raise the county sales tax and even tried raising your property tax. Meanwhile, hard time in the county jail turned into "Chapin time." Where convicts received cable tv and lounged on padded furniture in carpeted cells. Chapin's County Commission ran this soft jail ... a jail she called a "national model." Ask Chapin why she's hard on taxpayers and soft on convicts.

Chapin Decl. Exhibit 2; Chapin Decl. ¶ 10; Beckett Decl. ¶ 10; Pennington Decl. ¶ 14.[68] This type of electioneering advertisement, and many others like it, were run by the state party, which used mostly nonfederal funds to pay for it. It takes little convincing to find that these advertisements can, and do, directly influence the outcome of a federal election[69]

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[68] Another example of negative candidate advocacy funded by parties: "We expect our public officials to be responsible, do their jobs and obey the law. But Corrine Brown missed an astonishing 187 votes in Congress. . . . Apparently, Corrine Brown thinks she's above the law. A government audit found extensive violations of federal law during her 1992 campaign. Call Corrine Brown . . . . Tell her public officials should act responsibly, do their job and obey the law." ODP0041-1024. For more examples, see Findings 41, 45, 46.

[69] *See* Findings 36-52, 138-47. The parties were clearly not using such advertisements for party building purposes since 92 percent of the advertisements did not even mention the name of the party in the body of the advertisement. Buying Time 2000 at 64 (stating that in the 2000 election, almost 92 percent of party advertisements never even identified the name of a political party in the body of the advertisement, let alone encouraged voters to register with or support the party or to volunteer with the local party organization).



and that parties engaging in them are "electioneering in the guise of issue advocacy." Mann Expert Report at 26. Moreover, because the amount of money used for candidate advocacy is substantial,[70] the candidates are likely to feel even more indebted to the donors whose contributions to the political parties made possible this form of campaign assistance.[71] Not surprisingly, the use of nonfederal funds for this type of candidate advocacy was, to all appearances, Congress's primary concern in deciding to enact BCRA Sections 323(a) and 323(b).[72]

The record further demonstrates that congressional candidates know who the major soft money donors are.[73] In

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[70] *See* Oliver Dep. at 148-49 (estimating that the RNC spent around $56-61 million dollars on "issue ads" during the 2000 campaign); Marshall Decl. ¶ 3 (stating that the largest portion of Democratic National Committee ("DNC") budget during the 2000 election cycle was used for "issue ads"). In 2000, the RNC raised $254 million, a majority of which was transferred down to the state parties mostly for "issue advertisements." Josefiak Dep. at 76; Vogel Decl. ¶ 63; McGahn Decl. ¶ 55.

[71] The donors themselves are not blind to the fact that donations to the parties are used to benefit the federal candidates. *See, e.g.*, Rozen Decl. ¶ 12 ("Donors to the national parties understand that if a federal officeholder is raising soft money—supposedly 'non-federal' money—they are raising it for federal uses, namely to help that Member or other federal candidates in their elections.").

[72] *See supra* note 19.

[73] One donor, and former political fundraiser, observed the following:

> Information about what soft money donors have given travels among the Members in different ways. Obviously the Member who solicited the money knows. Members also know who is involved with the various major donor events which they attend, such as retreats, meetings and conference calls. And there is communication

some cases, they actively assist in helping the party to raise such contributions.[74] And as to those candidates who do not, the parties and the donors keep many of them apprised of who made the large donations. For example, Robert Hickmott, lobbyist and former DNC official, advised donors in the following manner:

> [W]hen one of my clients is going to make a donation to a federal candidate or party, hard or soft money, I advise them on the manner in which they should do that. I tell them not to just send the check to the party committee, for example, to the young staff member who is collecting the checks. Instead I tell my clients that they should personally give the money to a Member of Congress who then can give the money to the Chair of the party committee, who will in turn make sure that the

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> among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff. .

Randlett Decl. ¶ 10; *see also* Bumpers Decl. ¶¶ 18, 20 (testifying that "some Members even keep lists of big donors in their offices" and that "you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party. If someone in Arkansas gave $50,000 to the DNC, for example, I would certainly know that."); Wirth Decl. Exhibit A ¶ 17 ("[C]andidates were generally aware of the sources of the funds that enabled the party committee to support their campaigns.").

[74] *See* Findings 169, 170, 172-79; *Colorado II*, 533 U.S. at 458 ("[Y]ou are at the limit of what you can directly contribute to my campaign," but "you can further help my campaign by assisting the Colorado Republican Party." (quoting then-Congressman Wayne Allard)); *see also* Letter from Senator Mitch McConnell to Potential Donor at the Microsoft Corporation (August 17, 1998) (asking potential donor for an "immediate commitment" in support of the National Republican Senatorial Committee's ("NRSC's") issue advocacy campaign); *see also* Letter Senators Mitch McConnell and Bill Frist to Donor at Steel Service Center Institute (February 25, 1998) (thanking donor for a "nonfederal contribution of $25,000" to the NRSC).



> check reaches the young staff member. That way the donor, with one check, gets "chits" with multiple Members of Congress.

Hickmott Decl. ¶ 9.[75]

Finally, while there is no evidence in the record of actual quid pro quo corruption,[76] the record does establish that the public not only appreciates that there are many donors giving large sums of money (mostly corporations and unions) to the political parties,[77] but believes and expects that the donors—in return—receive privileged access to the legislators and special influence in the legislative process.[78] It is of little

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[75] *See* Findings 176, 208; *see, e.g.*, McCain Decl. ¶ 6 ("Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money," and "[d]onors or their lobbyists often inform a particular Senator that they have made a large donation."); Simpson Decl. ¶ 5 ("Even if some Members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what."); Boren Decl. ¶ 6 ("Each Senator knows who the biggest donors to his party are" because "[d]onors often prefer to hand their [soft money contribution] checks to the Senator personally, or their lobbyist informs the Senator that a large donation was just made.").

[76] *See* Findings 201-06, 209-10. Although it is possible—though not established—that the appearance of increased access alone is synonymous in the public's mind with increased influence, there is no evidence in the record that increased access necessarily results in actual influence. Since the Supreme Court has never found that access in and of itself constitutes corruption, I believe there is no evidence of actual corruption.

[77] *See* Buying Time 2000 at 62. In 2000, thirty-five of the top 50 nonfederal donors were corporations, and they gave a total of $29,447,350 to the Republican national committees in the 2000 election cycle which was 11.4 percent of all nonfederal money received by that national party. *See* Mann Expert Report at tbl. 6. Most of the other donors in the top 50 were unions and plaintiff attorneys. *Id.*

[78] Thus the Court reviews the evidence of actual or apparent corruption against the background of a plausible justification, and, as explained

surprise that Congress was particularly concerned with the consequences of the public's perception of a correlation between large donations to parties and the special access and influence that the public believes are accorded to these donors.[79] There is ample evidence, including polls[80] and press

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earlier, the more plausible the argument, the less evidence the defendants must marshal. *See Shrink Missouri*, 528 U.S. at 391-95.

[79] Whether because of the endless examples of donors receiving access in return for donations to parties, *see* Findings 211-43, the many press reports that made public such exchanges, *see infra* note 81, or constituent complaints about them, *see* Finding 269, members of Congress were understandably troubled with the appearance of corruption created by large nonfederal donations to parties. *See, e.g.*, 147 Cong. Rec. S2446 (Mar. 19, 2001) (Sen.Feingold) ("The appearance of corruption is rampant in our system, and it touches virtually every issue that comes before use."); 147 Cong. Rec. S3248-49 (April 2, 2001) (Sen.Levin) ("[P]ermitting the appearance of corruption undermines the very foundation of our democracy—the trust of the people in the system.").

[80] *See* Findings 251-68; *see, e.g.*, Mark Mellman & Richard Wirthlin, Research Findings of a Telephone Study Among 1300 Adult Americans 7 (Sept. 23, 2002) (poll result finding that 71 percent of Americans think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it is not what most people in the district want, or even if it is not what they think is best for the country); Robert Y. Shapiro, Public Opinion & Campaign Finance 13-14 (Sept. 18, 2002) (poll results showing that the public has been troubled by large donations to political parties).

Evidence, like these two reports, need not have been before Congress when it made its predictive judgment. *See Turner I*, 512 U.S. at 667 (explaining that to ensure that Congress drew "reasonable inferences," the Supreme Court needed "substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, *or the introduction of some additional evidence*." (emphasis added)); *Turner Broadcasting Sys., Inc. v. FCC ("Turner II")*, 520 U.S. 180, 185, 187, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997); *c.f. City of Erie v. Pap's A.M.*, 529 U.S. 277, 310-17, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (Souter, J., concurring in part and dissenting in part) (advocating a remand for development of the judicial record).



reports,[81] to support Congress's judgment that the special access and perceived special influence accorded to those large donors have undermined the public's confidence in the independence of its elected representatives from those donors, and thereby giving rise to an appearance of corruption. The record clearly establishes that those large donations are used in large part by the parties to bombard the public with candidate advocacy of the type defined by Section 301(20)(A)(iii). *See* Findings 36-52, 138-47. Because the advertisements are recognizably sponsored by the parties, *see supra* note 41, it takes little for the public to conclude that candidates are directly benefitting from large donations to the parties. Moreover, the fact that the public neither distinguishes between "soft money" and "hard money," nor is knowledgeable of the restrictions on contributions,[82] does nothing to deter the inference that the special access and influence it perceives are accorded to the donors is in return for the plainly visible assistance the parties provide to candidates' campaigns. Given the high plausibility that federal candidates feel indebted to donors who fund, through the parties, Section 301(20)(A)(iii) communications of which they are the beneficiary, and the equally high plausibility that

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[81] Senator Rudman observed:

> Almost every day, the press reports on important public issues that are being considered in Congress. Inevitably, the press draws a connection between an outcome and the amount that interested companies have given in soft money. . . . Even if a senator is supporting a position that helps an industry for reasons other than that the industry gave millions to his party, it does not *appear* that way in the public eye.

Rudman Decl. ¶ 11 (emphasis added); *see* Finding 270; *see, e.g.*, Dan Morgan and Juliet Eilperin, *Campaign Gifts, Lobbying Built Enron's Power in Washington*, Wash. Post, December 25, 2001, at A01; R.G. Ratcliffe and Alan Bernstein, *Political Donors Have the Money, and Get the Time*, Houston Chron., May 23, 1999, at 1.

[82] *See* Findings 264-67.

the public perceives that the special access and influence it believes are accorded to these donors is in gratitude for that assistance, the evidentiary documentation more than adequately convinces me that an appearance of corruption has arisen from such arrangements. Simply stated, Congress has drawn a reasonable inference of the same based on substantial evidence.[83]

Moreover, any fear that Section 301(20)(A)(iii) is overbroad is cured by the accumulated effects of three circumstances. First, Section 301(20)(A)(iii) only regulates communications that are candidate specific, not issue specific, such that most genuine issue communications should not be subject to regulation. *See* Hearing Tr. (Dec. 4, 2002) at 17. Second, though there are some genuine issue advertisements that do specifically mention candidates,[84] the fact that the Section 301(20)(A)(iii) definition requires the communication to have language that "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office" eviscerates any remaining overbreadth by

[83] *Turner I*, 512 U.S. at 666 (explaining that a court's role is to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence"). Though courts must "accord substantial deference to the predictive judgments of Congress," *Turner I*, 512 U.S. at 665, it does not " 'foreclose our independent judgment of the facts bearing on an issue of constitutional law,' " *id.* at 666 (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)).

[84] For example, genuine issue advertisements include: (1) advertisements that support oppose officeholder-named legislation, like the McCain-Feingold bill, which is the common label for the legislation at issue here; (2) advertisements supporting or opposing legislation that simply ends with a call-to-action line asking the viewers to contact their congressional members to vote against or for a particular bill; or (3) even advertisements that criticize a certain political personality in order to energize the party's base on a particular issue, so long as those advertisements are not broadcast within the identified candidate's district or state.



focusing on advertisements that directly influence "a candidate for that office." Finally, the fact that the "speaker" running this type of advertisement is a national or state party also supports the defendants' contention that most of the advertisements, referring to a candidate in this manner, will be intended to promote or attack that particular candidate.[85] A political party, as opposed to corporations and other nonparties, exists to a large extent for the purpose of electing candidates of its party to office.[86] In *Buckley*, the Supreme Court observed that expenditures by political parties, and other political committees with "the major purpose of which is the nomination and election of a candidate . . . can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." 424 U.S. at 79. In interpreting this language by the Supreme Court, the D.C. Circuit observed that "when an *organization* controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be *expenditures* within the statutory definition." *Akins v. FEC*, 101 F.3d 731, 742 (en banc) (D.C. Cir. 1996).[87] With this understanding of parties and other

[85] *See generally* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L.Rev. 620, 655-57 (2000).

[86] *See* Finding 27; *see, e.g.*, Brister Decl. ¶ 4 ("The Republican Party of Louisiana's primary purpose is to help elect Republicans to office 'from the courthouse to the White House.'"); RNC Chairman Haley Barbour's Update to the Members of the Republican National Committee, August 7, 1996, at 3 (stating that "[t]he purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president . . . Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures"); *see also* Hastert Amicus Br. at 20 ("The very purpose of the National Republican Congressional Committee is to maintain Republican control of the House.").

[87] *See also* Nelson Dep. at 191 (stating that the RNC engages in "issue advocacy in order to achieve one of our primary objectives, which is to get more Republicans elected").

political committees, it is not surprising that the Supreme Court limited disclosure of expenditures by all other groups to express advocacy, but sanctioned disclosure of *all* expenditures by "political committees." *Buckley*, 424 U.S. at 49. While not all party advertisements are intended to *directly* influence a federal election (i.e., genuine issue advertisements), the presumptively electoralfocus of parties suggests that party communications that do mention candidates are, more likely than not, designed to have some impact on a federal election.[88] For these reasons, Section 301(20)(A)(iii) is closely drawn to serve the government's interest.

[88] It bears repeating: Even though donations to political parties may be used *presumptively* for the purpose of influencing a federal election, it is clearly not an irrebuttable presumption, such that all donations should be regulated. While the Court insinuated that Congress could require disclosures for all expenditures by political parties, *Buckley*, 424 U.S. at 79, there is a simple explanation for this outcome--the Constitution affords less protection to less offensive speech infringements, like disclosure requirements, than for more offensive infringements, like expenditure limitations. *Compare id.* at 39-51 (rejecting expenditure limitations, even those on express advocacy), *with id.* at 79-81 (upholding disclosure requirements for express advocacy); *see also* Post, *supra* note 60, at 1843 ("[T]he placement of a line between election speech and public discourse must be sensitive to the nature of the proposed regulation of election speech. Relatively more benign forms of regulation . . . may constitutionally reach more deeply into the recesses of public discourse than more draconian requirements, like expenditure limitations."). Surely, the speech handicap imposed by contribution limitations, which simply requires that parties use hard money for certain activities, rests somewhere between that of expenditures limitations and disclosure requirements. *See, e.g., Buckley*, 424 U.S. at 20-23, 64-68; *see also Colorado I*, 518 U.S. at 611-26 (rejecting expenditure limitation on political parties, even though parties are considered "political committees" that are subject to disclosure of *all* disbursements).



Even so, plaintiffs contend that Section 301(20)(A)(iii) is still defective because its definition of communications that must be funded with federal money is too vague to withstand constitutional scrutiny. They claim that words such as "promote," "oppose," "attack," and "support" are too vague to enable party officials to determine where the line between noncandidate advocacy (i.e., pure issue advertisements) and candidate advocacy lies. Like Section 201's fallback definition, *see* BCRA § 201(a); FECA § 304(f)(3)(A)(i); 2 U.S.C. § 434(f)(3)(A)(i), however, the definition of candidate advocacy in Section 301(20)(A)(iii) is not unconstitutionally vague because: (1) potential party speakers can simply avoid regulation by not identifying a candidate; (2) the formulation Congress chose to use—even for those not expert in the subtleties of campaign advocacy—is anchored in every day words that have to be linked to a specific candidate's election, or re-election, to a *particular office;* (3) to paraphrase defendant's counsel during oral argument, as long as the communication is not neutral—as to the candidate's election or defeat—it is covered by the definition, *see* Intervenors Opp'n Br. at 66; and (4) the opportunity to seek advisory opinions to clarify any ambiguity "mitigates whatever chill may be induced by the statute and argues against constitutional adjudication on a barren record," *see Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-85 (D.C. Cir. 1980); *see also United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973).[89] Indeed, Section 301(20)(A)(iii), as crafted, "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited," "provide[s] explicit standards for those who

[89] When the *Buckley* Court found unconstitutionally vague FECA expenditure provisions, which involved different language, "the vast majority of individuals and groups subject to" the Act did "not have a right to obtain an advisory opinion," 424 U.S. at 41 n .47. Subsequently, Congress amended the advisory provision to make it available to "any person." 2 U.S.C. § 437f(a)(1).

apply them," and where First Amendment rights are implicated, does not induce "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

Even if the above factors were not enough to save Section 201 from a vagueness attack, those factors, combined with the identity of the speaker being restricted and the fact that it is a restriction on a contribution (as opposed to an expenditure), would still rescue Section 301(20)(A)(iii). Because political parties are sophisticated participants in the election arena, they are much more likely to recognize the line between candidate advocacy and genuine issue advocacy. *See Colorado II*, 533 U.S. at 453 ("[T]he party marshals [the power to speak] with greater sophistication than individuals generally could.").[90] Political parties, more than others, are also more likely to assume the risk that they have crossed the line.[91] In short, the argument that Section 301(20)(A)(iii) is unconstitutionally vague rings hollow as it applies to parties who are experts in the business of discerning what combination of words and images help, or harm, candidates.[92]

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[90] *See also* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L.Rev. 1751, 1792 (1999) ("[A]s skilled campaign professionals, the major political parties are in the best position to conform their activities to legal requirements.").

[91] As Justice Holmes observed: "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk." *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 74 L.Ed. 508 (1930).

[92] That political parties are the speakers is also relevant because since most of their communications are election-based speech, especially those that identify candidates, there is less potential for chilling pure issue advocacy.



Vagueness concerns are also less pronounced with regard to *contributions* than expenditures. When restrictions on expenditures are at issue, one must be concerned that if the potential speaker cannot discriminate between issue advocacy and candidate advocacy, then the speaker will shy away from speaking at all. The restrictions at issue here, however, only require that Section 301(20)(A)(iii) communications be funded with federal money, so if the political parties are afraid that a communication may promote or attack a candidate, they can simply resort to federal funds. In any event, if despite all of the mitigations, some slight potential for vagueness remains, "uncertainty at the periphery" does not render a provision unconstitutionally vague. *See FEC v. National Right to Work Comm.*, 459 U.S. 197, 211 (1982).

In sum, Section 301(20)(A)(iii), in its application to Sections 323(a) and 323(b), is neither unconstitutionally vague, nor insufficiently tailored to serve the compelling government interest of combating the appearance of corruption. By seeking only to restrict donations that can give rise to actual or apparent corruption, it sweeps neither too far nor too near. To the extent that "issue ads" are about issues in fact, as well as in name, political parties are free to raise as much soft money as they like for such advertisements. In contrast, soft money donations topolitical parties used for communications that support or oppose a clearly identified candidate for federal office—that is, candidate advocacy—directly affect a federal election and give rise to an appearance of corruption that Congress has a substantial interest in combating. Such candidate advocacy must be funded with federal money.

A final note on Section 301(20)(A)(iii). Requiring parties to fund Section 301(20)(A)(iii) communications with federal money not only serves the government interest of preventing actual and apparent corruption, but also prevents circumvention of campaign laws and principles. *See NCPAC*,

470 U.S. at 500 (noting the Court's "deference to a congressional determination of the need for a prophylactic rule").[93] Under Section 441b of FECA, corporations and unions are prohibited from using general treasury funds for independent expenditures expressly advocating the election or defeat of a particular federal candidate. 2 U.S.C. § 441b; *see also MCFL*, 479 U.S. at 241-64. If the backup definition of "electioneering communications" under Section 203 of BCRA is upheld, BCRA § 203(a); FECA §§ 316(a), (b)(2); 2 U.S.C. §§ 441b(a), (b)(2), corporations and unions would be additionally prohibited from using their general treasuries to fund candidate advocacy pieces which promote, oppose, attack, or support federal candidates. BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). Most of the largest nonfederal money contributions to parties are by corporations and unions. *See supra* note 77. Thus, if national and state parties were allowed to spend unlimited amounts of nonfederal money on candidate advocacy, corporations and unions could largely circumvent the new BCRA Section 203 by funneling unlimited funds through political parties to pay for advertisements that they are now prohibited from broadcasting under Section 441b of FECA. To allow such a circumvention in that manner would be ludicrous. Finally, to permit national (or state or local) parties to *convert* nonfederal donations, whether from the general treasuries of

[93] Title I does not, however, prevent circumvention of existing limitations on contributions to candidates in the manner set forth by the Supreme Court in *Buckley*, 424 U.S. at 38, and *Colorado II*, 533 U.S. at 456 & n. 18. Even before BCRA was enacted, because of existing party limitations on direct contributions to and coordinated expenditures on behalf of candidates, *see* 2 U.S.C. § 441a(d); *Colorado II*, 533 U.S. at 440-65, donors could not use the parties to funnel large sums of money directly to candidates in the form of contributions. Thus, any reliance on the Supreme Court's anticircumvention rationale in *Buckley* and *Colorado II*, *see* J. Kollar-Kotelly Op. at Part III.II.B.2.a.iii, necessarily dictates a novel application of that precedent.



corporations and unions, or from wealthy individuals and *MCFL* groups, to the federal purpose of directly influencing a federal election through candidate advocacy of the type defined in Section 301(20)(A)(iii) is, in and of itself, a direct circumvention of a fundamental premise of the FECA regulatory scheme relating to donations, blessed by the Supreme Court in *Buckley* and its progeny: *only federal money may be used to directly influence a federal election.* As long as the *Buckley* line of cases remains the law, it would make a mockery of those Supreme Court cases and the current regulatory scheme to allow political parties to use soft money to engage in what Justice Kennedy has aptly described as "covert advocacy." *Shrink Missouri*, 528 U.S. at 406, 407 (Kennedy, J., dissenting).

C. New FECA Section 323(d): Nonfederal Fund Restrictions on Tax-Exempt Organizations

Section 323(d) prohibits national, state, and local parties from donating either soft or hard money to, or soliciting for, either: (1) a Section 527 organization; or (2) a Section 501(c) organization if that organization makes expenditures in connection with a federal election, including expenditures for "federal election activity" as defined in Section 301(20)(A). BCRA § 01(a); FECA § 323(d); 2 U.S.C. § 41i(d). Judge Henderson strikes down the entire section as unconstitutional. I concur in her judgment, but for different reasons.

First, I would note that the defendants argue that the donation and solicitation restrictions should be reviewed under closely-drawn scrutiny. *See* Intervenors Opp'n Br. at 21-23. While I agree with the defendants that *Buckley's* closely-drawn scrutiny should apply to donation limitations to organizations as well as candidates, it is less clear which scrutiny should apply to the solicitation restriction. *See* J. Henderson Op. at Part IV.D.4. However, if the restriction on solicitation cannot even withstand closely-drawn scrutiny,

there is no need to choose between the standards of review. *Cf. Blount v. S.E.C.*, 61 F.3d 938, 942-43 (D.C. Cir. 1995).

As to the statute itself, Section 323(d) prevents national parties from donating *any* funds to certain Section 501(c) organizations. This complete ban on donations infringes the various parties' abilities to effectuate their members voices, and because it is not even closely drawn to serve a sufficient government interest, it cannot withstand scrutiny. Section 323(d) is not closely drawn as to Section 501(c) organizations because it prohibits solicitation for and donations to those organizations merely because they have made, in effect, expenditures for federal purposes in the past, and *regardless* of whether those donations will be used again for that very purpose. By not specifying the purpose for which the money will be put, Congress, in effect, is prohibiting solicitation for and donations to these Section 501(c) organizations that might in turn be used for *nonfederal or mixed* purposes. Congress, of course, can only do this if it could show that a sufficient government interest was being served by doing so. It has not. As discussed at length earlier, the only restrictions on uses of nonfederal funds that can be constitutionally regulated are uses that *directly affect a federal election. See supra* Parts I.A.2 & I.B.2. Any other use of the donation is too tangential to give rise to the risk of corruption, or appearance of corruption, that is necessary to warrant this congressional infringement on First Amendment rights. To say the least, the defendants have not produced sufficient evidence to demonstrate that an appearance of corruption, let alone corruption itself, arises when organizations of this type use donations from national, state, and local parties for nonfederal or mixed purposes.

Section 323(d) is also constitutionally problematic as a result of its treatment of Section 527 organizations. Section 527 organizations, according to the applicable IRS definition, exist, in part, to influence the selection, nomination, election,



or appointment of individuals to state and local public offices, as well as to various political organizations. 26 U.S.C. §§ 527(e)(1) and (2). Accordingly, since Section 527 organizations could expend the solicited or donated funds for one of these nonfederal or mixed purposes,[94] the blanket prohibition in Section 323(d) on national, state, and local parties from assisting them in this manner is similarly not closely drawn. Perhaps if Congress had structured Section 323(d) like Section 323(b) and prohibited these organizations from using nonfederal funds—which they had received from national, state, and local parties—to directly affect federal elections, it might have been able to demonstrate that the restriction was closely drawn to serve the sufficient government interest required under any standard of review to justify these infringements. But it did not. Therefore, for all of the above reasons, I conclude that Section 323(d) is unconstitutionally overbroad.

D. New FECA Section 323(e): Nonfederal Fund Restrictions on Federal Candidates

Judge Henderson and Judge Kollar-Kotelly uphold Section 323(e) in its entirety. While I concur to the extent that this section prohibits federal officeholders and candidates from receiving, directing, transferring, or spending any nonfederal funds in connection with any election, including the kind of election activity defined in Section 301(20)(A),[95] I dissent

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[94] For example, the California Republican Party funds Section 527 organizations to engage in voter registration activities in its Operation Bounty program. *See* Erwin Aff. ¶ 9.

[95] Soft money donations to federal candidates, regardless of whether they are used for nonfederal purposes by the candidates thereafter, can give rise to actual or apparent corruption, especially if the donation is of any magnitude. In those circumstances, it is natural for the public to presume that the donation will either be used to help the federal candidate get elected or in some other way that directly enures for his/her benefit.

with regard to the prohibition on a federal candidate, or officeholder, from soliciting funds for the benefit of his national party, especially since Congress can and has legally prohibited the parties (national, state, and local) from using nonfederal funds to directly influence federal elections. Accordingly, I am writing separately to dissent in part from, and concur in part in, their opinions.

With regard to the First Amendment rights of federal candidates and officeholders to solicit soft money funds for the use of their parties, I would dissent principally on the basis that the defendants have failed to demonstrate that soliciting nonfederal funds to be used by parties for purposes that, at most, indirectly affect federal elections is regulable by Congress. For example, donations used for such activities as party building, newsletters, genuine issue advocacy, and generic voter mobilization so *indirectly* affect federal elections, if at all, that they do not give rise to the minimally necessary appearance of corruption to warrant congressional intervention.

Indeed, soliciting donations to be used for the national party on such mixed (and/or nonfederal) purposes is the kind of conduct by officeholders which the public not only would expect them to participate in, but which is fundamental to the successful operation of the major national parties. To the extent that helping their parties in this way provides officeholders with some added status among other party officials, in my judgment, is too attenuated a benefit to give rise to the appearance of corruption necessary to warrant congressional intervention. *See supra* Part I.A.3. Accordingly, I concur in part in, and dissent in part from, the holding of my colleagues.

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Either way, the perception of a personal gain, and the sense of indebtedness that follows therefrom, justly warrants Congress's regulation.



E. New FECA Section 323(f): Nonfederal Fund Restrictions on State Candidates

Section 323(f) prohibits state candidates from spending funds for a communication of the type discussed in Section 301(20)(A)(iii) unless the funds are subject to the limitation, prohibitions, and reporting requirements of FECA (i.e., hard money). Restricting the use of soft money by state candidates for communications that directly affect federal elections is, of course, consistent with my preceding discussion of the constitutionality of Section 301(20)(A)(iii). By placing this restriction on state candidates Congress is simply guarding against similar conversions of soft money donations to fund communications that are designed to accomplish the federal purpose of directly influencing a federal election. Since this section is closely drawn to uses of soft money by state candidates exclusively for that purpose, I similarly uphold its constitutionality.

II. Title II: Noncandidate Campaign Expenditures Sections 201, 204, 213

I join with Judge Henderson, but for different reasons, in holding that the primary definition of electioneering communications set forth in Section 201 is unconstitutional. I do not, however, join in her holding that the backup definition also provided in Section 201 is unconstitutional.

To the contrary, I uphold the backup definition's constitutionality, as does Judge Kollar-Kotelly who joins in my opinion as a necessary alternative to Judge Henderson's and my finding the primary definition unconstitutional. The following are my reasons for rejecting the primary definition and upholding the backup definition.

A. Section 201: The Primary Definition

Title II of BCRA is Congress's attempt to close certain loopholes in FECA and to regulate certain conduct arising

from the use, both directly and indirectly, of corporate and union treasury funds to finance electioneering communications that directly affect federal elections, even though masquerading otherwise as "pure issue advocacy." Because, in part, Judge Henderson believes that *Buckley* and its progeny set forth a bright line test requiring the presence of certain "magic words" advocating the election or defeat of a federal candidate in order for this advocacy to be regulable by Congress, she strikes down both the primary and backup definitions.[96] Judge Kollar-Kotelly and I disagree with this reasoning, and I join in the portion of her opinion analyzing why the Supreme Court never intended the so-called express advocacy test to be a constitutional rule of law limiting the power of Congress to regulate expenditures for certain uncoordinated advocacy that directly affects federal elections, notwithstanding the absence of these words.[97]

While Judge Kollar-Kotelly and I agree regarding Congress's power to regulate the source of the funds used for these communications and the disclosures that donors must file, I do not agree that the primary definition, as crafted by Congress, is sufficiently tailored to regulate the electioneering advocacy it seeks to cover. To the contrary, the primary definition, which regulates communications referring to clearly identified federal candidates based upon when and where they are broadcast, rather than their effect on federal elections, sweeps so broadly that it captures too much First Amendment protected speech that Congress, in the absence of a demonstrated compelling government interest, has no power to regulate. What type of speech is that?

The plaintiffs have clearly demonstrated that corporations, interest groups, labor unions and other entities air genuine issue advertisements in the periods immediately preceding

[96] *See* J. Henderson Op. at Part IV.A.

[97] *See* J. Kollar-Kotelly Op. at Part III.I.C.1 & Part III.I.C .2.



general and primary elections, the sole purpose of which is educating the viewers about an upcoming vote on pending legislation, and encouraging them to inform their elected representative to vote for or against the bill (i.e., legislation-centered advertisements). Edward Monroe, Director of Political Affairs for Associated Builders and Contractors ("ABC"), explained that "serious legislative initiatives or regulatory proposals often are considered near the time of elections." Monroe Decl. ¶¶ 18-19. Laura Murphy, legislative director for the ACLU, seconds this: "[The] 60 days before a general election and 30 days before a primary . . . are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of the debate occurs against the backdrop of pending legislative action or executive branch initiatives." Murphy Decl. ¶ 12. *See also* Mann Cross Exam. at 176 (explaining that a flurry of legislative activity occurs near the end of a congressional session, therefore, often within the 60 day period preceding a general election); Finding 359.[98]

[98] For example, last fall alone, in the period immediately preceding the 2002 congressional election, Congress considered the following important, and controversial, pieces of legislation: a resolution authorizing the use of armed force against Iraq, (H.J.Res.114, 107th Cong.); an election reform bill to update ballot machines and provide greater access to individuals with disabilities to polling places (H.R.3295, 107th Cong.); legislation to establish the Department of Homeland Security (H.R.5710, 107th Cong.); and various appropriations bills for federal departments, including the Departments of Defense, Justice, and State. While last fall's legislative calendar may not be typical, it nevertheless illustrates BCRA's potential impact on genuine issue advocacy. Murphy Decl. ¶ 12 ("Some of the President's or Attorney General's boldest initiatives are advanced during election years—often within 60 days of a general election. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period.").

Notwithstanding defendants' expert testimony to the contrary,[99] interest groups believe, and plaintiffs expert agrees,[100] that the periods immediately preceding elections are the most effective times to run issue advertisements discussing pending legislation because the public's interest in policy is at its peak.[101] Edward Monroe of ABC explains that "it is . . . clear that members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near. If that is the time when people will listen, that is the time to speak. And once an election occurs, there seems to be a period of fatigue during which political matters are of less interest, making issue ads then less effective." Monroe Decl. ¶¶ 18-19; *see also* Finding 359. Likewise, Paul Huard, Senior Vice President for Finance and Administration for the National Association of Manufacturers ("NAM"), finds that "Americans tend to have greater interest in political matters as an election approaches. At the same time, elected officials are most attuned to the views of their constituents in the pre- election period. Thus, for many purposes, the pre-election season is a critical time for issue ads." Huard Decl. ¶ 10; *see also* Finding 359.

The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these

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[99] *See* Finding 359 n.224.

[100] *See* Finding 358 (statement of Dr. Gibson, rejecting the defendants' argument that it is unproductive to run legislation-centered issue advertisements focusing on policy matters in the periods before elections).

[101] *See* Findings 358-60.



advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293. A quick review of a classic example of a legislation-centered genuine issue advertisement demonstrates these points.

In 1998, the AFL-CIO aired an advertisement entitled "Barker." The advertisement referred to a federal candidate by name only in the call-to-action line at the end of the advertisement where it urged viewers to call their Member of Congress and express their position regarding the pending Fast Track trade legislation. The legislation was scheduled for a vote in the House of Representatives on September 25,

1998—within 60 days of the general election. The text of the advertisement is as follows:[102]

> Paid for by the Working Men and Women of the AFL-CIO. [Barker speaking]: Okay ladies and gents, step right up and see if you can follow the ball. Is it here? Is it there? Where could it be? [Voice over]: They're playing games again in Washington. Without discussion or debate, they're planning another vote on the controversial Fast Track law—special powers to ram through trade deals like NAFTA. Fast Track failed *last* year because working families don't want more trade deals that put big corporations first; deals that ignore our concerns about lost jobs; environmental problems on our borders, and dangerous, imported foods. But Newt Gingrich and the sponsors of Fast Track hope they can sneak it by this fall, while public attention is focused on other issues. [Barker speaking]: Keep your eyes on the ball now . . . [Voice over]: Call Representative _____ at xxx-xxx-xxxx and tell him to vote *no* on Fast Track. Tell him we're still paying attention. And Fast Track is *still* a bad idea.

Mitchell Decl. Exhibit 116, Exhibit 1 at 86. Defendants' own expert, David Magleby, who stated in his report that he would "presume" an advertisement is electioneering merely because it mentions a federal candidate by name,[103] candidly admitted after reviewing "Barker" that such an advertisement is a "genuine" issue advertisement. He concluded as such—even though it mentions a federal candidate's name—because

[102] The advertisement aired in the districts of Congressman Chris John (LA-07); Congressman Scott Klug (WI-02); Congresswoman Jo Ann Emerson (MO-08); Congresswoman Anne Northup (KY-03); Congressman Jack Kingston (GA- 01); and Congressman Rick White (WA-01), and referred to those federal candidates by name. *See* Finding 368.

[103] *See* Finding 290 (discussing the indicia of electioneering advertisements).



"[t]he body of the ad has no referent to [a candidate] whatsoever. The only referent to [the candidate] is the call line." Magleby Cross Exam. at 104.

> [A] generic call your Congressman, call your Senator, when then linked to a legislation and call your Congressman or Senator about this legislation without a referent to their position on the issue, seems to me substantively different than when they are mentioned in view of what their position is on that issue. Q. When you say substantively different, are you referring to a difference with respect to whether the advertisement communicates an electioneering message? A. Yes.

Magleby Cross Exam. at 106.

Because genuine issue advertisements, like "Barker," have been, and will need to be, aired during periods of legislative activity leading up to elections, plaintiffs contend the primary definition, if upheld, will capture them as "electioneering communications."[104] As such, they will be subjected to a host of limitations and regulations which, according to the plaintiffs, will limit and chill their ability to engage in First Amendment protected speech. I agree.

The crux of the problem with the primary definition is that, unlike the backup definition, it does not depend on the effect of the communication's message on a candidate's election. As such, many genuine issue ads, like "Barker," will be treated the same as the sham "issue" ads Congress supposedly was intending to regulate. It is the absence of a link between the advocacy of an issue and a candidate's fitness, or lack thereof, for election that renders congressional intervention with respect to genuine issue ads of this type unconstitutional. Notwithstanding the absence of this link, defendants contend,

[104] McConnell Opening Br. at 65 (arguing generally that genuine issue advocacy will be regulated by BCRA); NRA Opening Br. at 26.

and Judge Kollar-Kotelly agrees, that the evidence sufficiently demonstrates that even though some genuine issue advertisements that run in the months leading up to an election will be swept in under this definition, it is too insufficient a number to render the primary definition constitutionally defective. I disagree.

The plaintiffs have met their burden in this facial challenge because they have shown that BCRA's primary definition "reaches a *substantial amount* of constitutionally protected conduct." *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)) (emphasis added). Plaintiffs, in short, have demonstrated from the statute's "text . . . and from actual fact that a *substantial number of instances* exist in which the [l]aw cannot be applied constitutionally." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988) (emphasis added). These instances are not merely "'some' overbreadth," *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002) (quoting *Reno v. ACLU*, 521 U.S. 844, 896 (1997)), or a "single" or "bare possibility" of an impermissible application. *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 & n.19 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting)). Instead, the plaintiffs have shown, as the Supreme Court aptly put it in *Vincent*, that BCRA presents "a *realistic danger* that the statue will *significantly compromise* recognized First Amendment protections of parties not before the Court." *Id.* at 800-801.

The evidentiary basis of both the plaintiffs' and defendants' arguments concerning the primary definition's overbreadth is the *Buying Time 1998* and *Buying Time 2000* studies. While the defendants correctly contend that plaintiffs carry the burden to show that BCRA is substantially



overbroad,[105] the studies defendants rely upon to show that it is narrowly tailored[106] are, in essence, a highly controversial "survey" of the ads run in the months leading up to the 1998 and 2000 elections. Judge Henderson correctly notes in her opinion, *see* J. Henderson Op. Part IV.A, that the parties "quarrel at length" regarding the significance of the *Buying Time* studies and, in particular, its conclusions regarding the percentage of genuine issue advocacy that would be improperly regulated by Section 201 of BCRA. Unlike Judge Henderson, I believe that the *Buying Time* studies are entitled to some evidentiary weight.[107]

However, I do not believe that the studies' statistical conclusions are the last word in this Court's analysis of whether or not the primary definition is overbroad. With the respect to the percentage of protected, political speech that is, or will be, regulated by BCRA, it is, of course, impossible to quantify the exact percentage with absolute certainty. *See New York v. Ferber*, 458 U.S. 747, 773 (1982) (explaining that "[h]ow often, if ever" the statute at issue in *Ferber* would regulate protected speech "cannot be known with certainty.

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[105] Gov't Opening Br. at 159; Gov't Opp'n Br. at 68.

[106] The definition itself—a content-indifferent definition based on time and location alone—is a novel approach to regulating campaign speech. *See* Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L.Rev. 1773, 1777-78 (2001) (drawing a distinction between "'intent tests,'" like the backup definition, that usually require a "factfinder to determine whether the person or group sponsoring the advertisement intended to influence the outcome of an election," and the "'bright line'" tests which "attempt to regulate all advertisements that meet certain objective criteria.").

[107] Judge Henderson accords no evidentiary weight to the *Buying Time* studies. *See* J. Henderson Op. at Part III.B.2 & Part IV.A. See also Findings 322-33 and 344-48 for a discussion of how the criticisms of the *Buying Time* studies do not preclude this Court from relying on those studies for the purposes of this litigation.

Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach."). Thus, it is important not to overstate the significance of the *Buying Time* studies when using them as the basis of a finding of unconstitutional overbreadth. After all, the studies did not analyze every advertisement that ran in every market during the 1998 and 2000 elections. Instead, they analyzed the top 75 media markets, encompassing eighty percent of the advertisements runs during those elections. *See* Findings 315-17. I do not state this fact to suggest that every ad had to be reviewed before the studies could be deemed credible, rather, that the percentages produced by the studies may, in fact, be an overstatement, or understatement, of the statute's overbreadth. *See* Findings 317-18. In addition, I would note that the *Buying Time 2000* study did not analyze advertisements run in the 30 days preceding a primary or preference election, even though such ads aired during that period are entirely regulable by BCRA's primary definition. *See* Finding 316.

Furthermore, this Court, in my judgment, cannot rely upon the results of the two, *Buying Time* studies without analyzing, to some extent, the parties' dispute regarding the formulas used to produce those results. The defendants favor the formula used in the 1998 study,[108] which compares the total number of genuine issue ads regulated by BCRA to the total number of genuine issue ads run in a calendar year. *See* Findings 335, 336, 337. The result is the percentage of all genuine issue advocacy that would have been regulated by

[108] Gov't Opp'n Br. at 74. Defendants argue that the 1998 formula best "measures the impact of BCRA on the universe of genuine issue ads aired in any particular calendar year and, thus, answers the critical question at the heart of any analysis of BCRA's potential overbreadth, i.e., the amount of genuine issue advocacy that BCRA would subject to regulation." Gov't Reply Br. at 72.



BCRA in the course of that year. The plaintiffs, however, contend that the 1998 formula misstates BCRA's impact because it includes ads that were run *outside* the 60-day period preceding a general election, and therefore would not have been subject to regulation under the primary definition. *See* Findings 336, 338. According to the plaintiffs, the formula applied in the *Buying Time 2000* study more accurately reflects BCRA's impact by focusing on the exact period of time regulated by BCRA: the 60 days preceding a general election.[109] Looking at ads aired only during that 60-day period, the 2000 formula compares the number of genuine issue ads to the total number of ads, thereby calculating the percentage of all ads that would have been regulated by BCRA that were genuine issue ads.[110]

As the Supreme Court in *Broadrick v. Oklahoma* stated that a statute's overbreadth must be "judged in relation to the statute's plainly legitimate sweep," I find that the 2000 formula more accurately measures BCRA's impact. 413 U.S. 601, 615 (1973). The results produced by the 1998 formula do not assist this Court in comparing BCRA's overbreadth to its "plainly legitimate sweep," because it measures ads that never would have been regulated by BCRA.[111] While the 1998 formula shows BCRA's impact on all genuine issue advocacy over the course of a calendar year, that information is of limited value when BCRA's primary definition applies only in the 30 days preceding a primary election and the 60 days before a general election.[112]

[109] McConnell Opening Br. at 67; McConnell Reply Br. at 35-36 (offering an analogy to explain the methodology of the two formulas).

[110] Gov't Opp'n Br. at 73 (explaining the 2000 formula); *see also* Finding 338.

[111] *See* Finding 336.

[112] *See* Lupia Rebuttal Report at 25. Defendants' expert, Dr. Arthur Lupia, concludes that while either formula is reasonable, the 2000 formula

Applying the 2000 formula to the data collected during the 1998 and 2000 studies shows that the primary definition's overbreadth is neither speculative nor hypothetical, but real and substantial. In 1998, of the ads that met BCRA's primary definition and were aired in the 60 days preceding a general election, 14.7 percent were genuine issue advocacy. *See* Finding 339. As to 2000, however, the *Buying Time* 2000 study concluded that figure was only 2.33 percent. *See* Finding 357. That percentage, however, was later increased by Professor Goldstein, who compiled the data base that served as the foundation of the *Buying Time* studies. Professor Goldstein testified on cross examination that he had reevaluated the results of the study for the purposes of this litigation and concluded that, in fact, 17 percent of the ads that met BCRA's primary definition and were aired in the 60 days preceding the 2000 general election were genuine issue advocacy. *See* Finding 357; *see also* Goldstein Cross Exam. at 160, 169; McConnell Reply Br. at 36-37. Percentage discrepancies aside, I find that 14.7 percent and 17 percent of the ads run in the months leading up to the 1998 and 2000 elections, respectively, represents a "substantial amount" of protected speech and renders the primary definition defective as constitutionally overbroad.

But these statistics, alone, do not present the full picture of BCRA's impact on genuine issue advocacy in the 60 days preceding a general election. Indeed, determining whether BCRA's primary definition reaches a substantial amount of constitutionally protected issue advocacy is not simply a function of calculating the percentage of pure issue ads that would have been captured by that definition during the 60-day period preceding the 1998 and 2000 federal elections. Because the total amount of issue advocacy likely to be

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"could provide information about the impact during a particular time period," that is, the 60-day period in when BCRA applies. *See also* Finding 340.



generated in any given election year is a function of both the quantity and nature of the issues Congress chooses to address in that pre-election period, those numbers should not be viewed in a legislative vacuum. Ideally, this court should additionally assess whether the legislative agendas in 1998 and 2000 were unusually active, controversial or both. Regrettably, however, the record does not lend itself to such an analysis. Obviously, the more active and/or controversial the legislative schedule, the greater (or lesser) the amount of issue advocacy one would expect it to have generated. Simply put, the amount of pure issue advocacy captured in a particularly contentious, or active, legislative period, is likely to be higher than that captured in a slow, or routine, legislative period. Furthermore, restricting 14.7 percent of genuine issue advocacy in 1998 would have restricted otherwise protected speech that would have been seen in 30 million American homes, a number that brings into sharp relief the effect BCRA will have on the amount of information available to voters. *See* Finding 335. Accordingly, for the reasons stated previously, there is reason to believe that the amount of issue advocacy likely to be generated in future election cycles will be at least as substantial as it was during those years.

Ever mindful that overbreadth is "strong medicine" to be used "sparingly and only as a last resort," *Broadrick*, 413 U.S. at 613, I do not lightly find that the primary definition of electioneering communications is substantially overbroad. However, the realistic danger that the primary definition of electioneering communications will significantly compromise genuine issue advocacy necessitates such a finding. In circumstances such as these, "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (quoting *Broadrick*, 413 U.S. at 612). I

therefore find that the primary definition of electioneering communications is unconstitutionally overbroad.

I do not, however, join in Judge Henderson's conclusion that both the primary and backup definitions of electioneering communications are unconstitutional due to underinclusion. Plaintiffs argue, and Judge Henderson agrees, that Section 201 must fail because it regulates only broadcast and cable communications, but does not regulate other mediums of communication such as print, direct mail, and the internet.[113] I disagree and join Judge Kollar- Kotelly's analysis on that issue. *See* J. Kollar-Kotelly Op. at Part III.I.F. However, one point bears emphasizing: Congress is infinitely more familiar than this Court with the circumstances and practical ramifications surrounding federal elections and campaign finance laws. The record thoroughly, and convincingly, demonstrates that Congress's decision to regulate broadcast communications, rather than other forms of communication, was well justified. Congress, as defendants argue, "need not regulate the entire universe of activity intended to influence federal elections" in order to constitutionally regulate electioneering communications. Gov't Opp'n Br. at 96. As Congress, in its expertise, has made this judgment and the record "demonstrates that the recited harms [justifying a statute] are real," plaintiffs' argument that the statute is unconstitutional for underinclusion is unavailing. *Turner I*, 512 U.S. at 664.

B. Section 201: The Backup Definition

Unlike the primary definition, the backup requires as a link between the identified federal candidate and his election to that office, certain language the purpose of which is advocacy either for, or against, the candidate. For the same reasons that

[113] *See* McConnell Opening Br. at 75-77; J. Henderson Op. at Part IV.A.



the absence of that link doomed the primary definition, it sustains the backup.

Congress concluded, and the record more than adequately demonstrates, that in the twenty-eight years since *Buckley*, corporations, unions, and interest groups, have increasingly affected federal elections by funding out of their general treasuries uncoordinated "issue ads" that either they, or a political party, ran in the months leading up to an election. *See* Findings 280-84, 296- 301; *see also* Annenberg Study at 1, 4, 3, 7-8 (showing that the number of issue advertisements has increased, as well as the number of groups airing them, from 1996 to 1998, and that corporations, interest groups, and unions began in 1996 to actively use treasury funds to sponsor issue advertisements that "looked and sounded like campaign ads."). In order to avoid regulation as express advocacy, those so-called "issue advertisements" did not contain certain "magic words" designed to support or oppose a specific candidate's election or re-election.[114] The ads, however, were constructed in such a way that they simultaneously presented their sponsors' stand on an issue, identified a specific candidate's positions or track record thereon, and under the guise of admonishing the viewer to inform the candidate of his view, suggested that a candidate who takes (or has taken) the candidate's position should (or should not) be elected to that office. Ads such as these have been typically described as "sham issue advertisements,"[115] or

[114] *See* Krasno & Sorauf Expert Report at 53; Goldstein Report at 10, 16, 31 (noting that in the 1998 election cycle, only four percent of ads sponsored by candidates or parties used words of express advocacy, and in 1996 through 2000, FECA did not regulate a majority of ads aired by interest groups: for every interest group ad regulated by FECA in 2000, twenty ads that mentioned federal candidates were not covered). *See also* Finding 272.

[115] The ads have also been described as "electioneering ads" or "issue ads." *See* Findings 288-89.

candidate-centered advertisements, and the factual record unequivocally establishes that they have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that. *See* Findings 273-74. Indeed, they have been so successful that it is widely believed in the industry that old fashioned express advocacy of the "magic words" type is far less effective in winning over a viewer's vote. *See* Findings 273-74, 279; *see also* Bailey Decl. ¶¶ 1-2 (stating that "it is rarely advisable to use such words as 'vote for' or 'vote against.'").

Defendants contend that because these sham issue ads, in essence, directly affect federal elections, candidates are "beholden" to those who fund them.[116] It is that indebtedness, according to the defendants, that if left unregulated, will undermine the public's confidence in the integrity and fairness of our electoral process in the same way that unregulated express advocacy otherwise would, and thereby give rise to corruption or the appearance of corruption. *See* Mellman and Wirthlin at 9-10.[117] For essentially the same reasons that I uphold Congress's definition of federal election activity in Section 301(20)(A)(iii), *see supra* Part I.B.2, I believe that large soft money expenditures to fund this type of covert advocacy, regardless of whether corporations, labor unions, and interest groups produce them themselves, give rise to a public perception that the candidate is being directly benefitted and will naturally reciprocate with either favored

[116] Intervenors Opening Br. at 108; *see generally* Gov't Opening Br. at 142-46; Intervenors Opening Br. at 104-109.

[117] The Mellman and Wirthlin poll, which was conducted from August through September 2002, showed that 80 percent of those polled believed a Member of Congress would be likely to give special consideration to a group that had run issue ads on his or her behalf. Mellman and Wirthlin concluded that "Americans see very little difference between the influence of a soft money donation to a political party and the funding of political ads on television and radio." Mellman & Wirthlin Report at 9.



access, or increased legislative influence, or both. *See id.* Accordingly, the source of the funds used and the identity of the sponsors are both, in my judgment, regulable by Congress.

Plaintiffs raise a number of arguments as to why the backup definition of electioneering communications is "impermissibly vague." McConnell Opening Br. at 70. First, they claim that "reasonable people can, and emphatically do, disagree about whether virtually any particular advertisement meets the criteria of BCRA's fallback definition." *Id.* As proof of the definition's vagueness, plaintiffs offer the deposition testimony of one of BCRA's sponsors and one of defendants' expert witnesses, in which they disagree about whether a particular ad is a genuine issue ad, or whether it promotes or supports a particular candidate.[118] Plaintiffs also offer testimony of two Members of Congress, in which one concludes that a particular ad supports a candidate, while the other concludes that the same ad attacks the candidate.[119] While BCRA's sponsors may disagree about the purpose and effect of an ad, that fact alone does not demonstrate unconstitutional vagueness. Perfect clarity, of course, is not required when a law regulates speech. As the Supreme Court said in *Grayned*, "we can never expect mathematical certainty from our language." 408 U.S. at 110 (1972). For this reason, the Supreme Court has held that a statute's vagueness exceeds constitutional bounds only when "its deterrent effect on legitimate expression is . . . both '*real and substantial*' and . . . the statute is [not] readily subject to a narrowing construction by state courts." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976) (quoting *Erznoznik v.*

[118] *See* McConnell Opening Br. at 73 (discussing Senator John McCain's opinion that a particular issue ad was a "sham" ad, while Dr. Holman, an expert witness, believed the ad was genuine issue advocacy).

[119] *See id.* at 72 (discussing deposition testimony of Senator Feingold and Representative Meehan).

*City of Jacksonville*, 422 U.S. 205, 216 (1975)) (emphasis added). Moreover, if a statute "gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited," it is not void for vagueness. *Grayned*, 408 U.S. at 108.

Next, plaintiffs contend that the definition's use of the words "promote," "support," "attack," and "oppose" to define the sponsor's message causes it to be unconstitutionally vague.[120] I disagree. The backup definition's language, specifically those words, is not void for vagueness because a person of ordinary intelligence would understand what is prohibited. *See Grayned*, 408 U.S. at 108. Indeed, one need only conclude, in effect, that the ad is *not* neutral as to both candidates for it to have satisfied the backup definition, and thereby have satisfied the objective First Amendment standard that a reasonable person considering the context and nature of the expression at issue is able to evaluate the speech. Such objective tests have routinely been applied in the First Amendment context. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (religious expression); *Hess v. Indiana*, 414 U.S. 105 (1973) (fighting words); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (fighting words). For example, the following advertisement entitled "No Two Way" and sponsored by the AFL-CIO is not neutral as to a federal candidate, as it attacks his or her position on the federal budget. Mitchell Decl. ¶ 41. While former Congresswoman Andrea Seastrand is named, this advertisement also ran in thirty-five other congressional districts, naming federal candidates from those districts.

> CAROLYN: My husband and I both work. And next year, we'll have two children in college. And it will be very hard to put them through, even with the two

[120] *See* McConnell Opening Br. at 70-75.



> incomes. [Announcer]: Working families are struggling. But Congresswoman Andrea Seastrand voted with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy. She even voted to eliminate the Department of Education. Congress will vote again on the budget. Tell Seastrand, don't write off our children's future. CAROLYN: Tell her, her priorities are all wrong.

Mitchell Decl. Exhibit 114. Congress is not, and should not be, constitutionally confined to "bright line" tests such as the primary definition or the "magic words" formulation in enacting campaign finance restrictions. A person of ordinary intelligence can be expected to understand this test, and know what is prohibited.

However, while I do not believe that the words used to define the message are vague, I do believe that the backup definition's final clause, which requires the message to be "suggestive of no plausible meaning other than an exhortation to vote," is unconstitutionally vague. In my judgment, it is extremely difficult, if not impossible, for a speaker to determine with any certainty *prior to* airing an ad that it meets that requirement. Whether an ad is suggestive of no plausible meaning other than an exhortation to vote depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified.[121] The "uncertain meaning[]" of this phrase in the backup definition will, as the Supreme Court stated in *Grayned*, "inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas are clearly marked." 408 U.S. at 109. The chilling effect of this language does not doom the backup definition as unconstitutionally vague, however, because it is susceptible to a saving construction. *See Edward J. Debartolo Corp. v.*

[121] *See* Finding 291.

*Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1998) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); *see also Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560-61 (2d Cir. 1988) (finding that as "the presumption is in favor of severability," the court "dropped" the "invalid part" from an FCC regulation, i.e., the words "or indecent," because "the remainder of the statute is fully operative."), *cert. denied*, 488 U.S. 984 (1988).

The backup definition's susceptibility to a saving construction is a function of how it is written. Because the offending phrase is simply appended to the end of the definition, it can be excised without rewriting the entire definition. *See Commodity Futures Trading Comm'n*, 478 U.S. at 841 ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of statute ... or judicially rewriting it." (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (internal quotations omitted)). By so construing the backup definition to avoid vagueness, the definition assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, genuine issue advocacy, specifically of the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. *See* Findings 368-73 (providing examples of legislation-centered advertisements that do not promote, support, attack, or oppose the election of a federal candidate).



Indeed, the backup definition of electioneering communications with its final clause severed is very similar to the type of "public communication" defined by BCRA's Section 301(20)(A)(iii) as "federal election activity." *See* BCRA § 301(20)(A)(iii). While the arguments against vagueness applicable to Section 301(20)(A)(iii) are generally applicable to the backup definition, one distinction is important to note: the sophistication in electioneering communications of the parties being regulated is not equally applicable to the backup definition. That said, however, I do not believe it is necessary to make a similar finding here in regard to the comparative sophistication of corporations, labor unions, interest groups, and other participants in political speech. Additionally, whatever chilling effect, if any, the definitions of "public communications" and "electioneering communications" may have are minimized in two, substantial ways: (1) corporations, labor unions, national banks, individuals, and other entities can avoid regulation simply by not mentioning a candidate for federal office in its ad, and (2) those groups may seek an advisory opinion from the FEC to determine whether a communication is regulated by BCRA.[122]

Thus, the plaintiffs have failed to demonstrate that the vagueness of the backup definition as severed is real and substantial enough to deprive a person of ordinary intelligence a reasonable opportunity to know what is prohibited. As such, the backup definition of electioneering communications is constitutional.

C. Section 204: The Wellstone Amendment

While I join Judge Henderson in holding that Section 204 is unconstitutional as it applies to MCFL nonprofit corporations, I do not agree that it is unconstitutional as it applies to those nonprofit corporations that do *not* qualify for

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[122] *See supra* Part I.B.2.

*MCFL* status. Therefore, I am writing separately to explain my reasons for joining with Judge Henderson in part, and with Judge Kollar-Kotelly in part who upholds the constitutionality of Section 204 for different reasons.

Defendants concede that Section 204 does not contain an exemption for MCFL organizations. However, defendants argue that an exemption nonetheless exists for those organizations because the Supreme Court in *MCFL* "carve[d] out an *as-applied* exemption to restrictions on corporate election activity." Gov't Opening Br. at 167 (emphasis in original). It is therefore inconsequential, according to the defendants, that BCRA does not codify the *MCFL* exemption. The defendants' reasoning misses the mark.

Under FECA, nonprofit corporations were required to pay for express advocacy expenditures from a separately segregated fund, rather than general treasury funds, unless that corporation met the three requirements set forth by the Supreme Court in *MCFL*.[123] Section 203 of BCRA expands FECA's separately segregated fund requirement to apply not only to corporate expenditures for express advocacy, but to expenditures by corporations, labor unions, and national banks for electioneering communications (i.e., nonexpress advocacy), as defined by Section 201. Likewise, Section 203 *expands* the exemption for nonprofit corporations from the separately segregated fund requirement of FECA. Whereas only those nonprofit corporations that met the three requirements set forth in *MCFL* were exempt from FECA's separately segregated fund requirement, Section 203 of

[123] That is, (1) whether the corporation is "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated," so that members have "no economic disincentive for disassociating with it if they disagree with its political activity; and (3) the corporation "was not established by a business corporation," and has a policy of refusing "contributions from such entities." *MCFL*, 479 U.S. at 264.



BCRA ignores completely the *MCFL* criteria and instead provides that *all* nonprofit corporations organized under either Section 501(c)(4) or Section 527(e)(1) of the Internal Revenue Code may pay for electioneering communications using general treasury funds, simply by virtue of their incorporation under those sections. Doing so, in my judgment, was perfectly consistent with both *MCFL* and Congress's power under the Elections Clause, U.S. Const. art. I, § 4.

What Section 203 provides, however, Section 204 takes away. As defendants acknowledge, Section 204 completely cancels out the exemption for all nonprofit corporations provided by Section 203. *See* Gov't Opening Br. at 164, n.115. Plaintiffs contend, and Judge Henderson agrees, that Section 204 is unconstitutional because, in essence, it contravenes the Supreme Court's decision in *MCFL*.[124] I, too, agree with this conclusion, but I also believe that Section 204 is unconstitutional only in its application to those nonprofit organizations exempted under *MCFL*. Congress, in my judgment, has the authority to withdraw the exemption it provided in Section 203 to those nonprofit corporations *not* exempted by *MCFL*. Thus, the fact that Section 204 applies to nonprofit corporations does not, in and of itself, impair its constitutionality; the critical factor is whether the nonprofit corporation that is being regulated is one protected from such regulation by the *MCFL* holding.

Congress's authority to withdraw the expansion of the exemption rests on the same basis as its authority to require non-*MCFL*, nonprofit corporations to use only separately segregated funds to purchase electioneering communications: the demonstrated appearance of corruption that arises if for-profit corporations and unions are able to funnel their general treasury funds through nonprofit corporations in order to

[124] *See* NRA Opening Br. at 17-24; ACLU Opening Br. at 16-17.

purchase electioneering communications that they cannot otherwise purchase directly.[125] Judge Kollar-Kotelly sets forth this reasoning in the portions of her opinion upholding Section 203's prohibition on the use of corporate and union treasury funds, and Section 201's disclosure requirements, for corporations, unions, and nonprofit corporations. *See* J. Kollar-Kotelly Op. at Part III.I.E.1.a. I concur in her reasoning and it needs no further repetition here.

Accordingly, for the reasons stated above and the relevant portions of Judge Kollar-Kotelly's opinion, I hold that Section 204 is unconstitutional only in its application to *MCFL*, nonprofit corporations.

D. Section 213: The Party Choice Provision

Under FECA, as interpreted by the Supreme Court in *Colorado I*, and *Colorado II*, national party committees could make unlimited independent expenditures on behalf of a federal candidate, as well as coordinated expenditures up to the amount provided for by the Party Expenditure Provision, 2 U.S.C. § 441a(d).[126] BCRA, however, changes this by

[125] *See generally Austin*, 494 U.S. at 256-60; *MCFL*, 479 U.S. at 658-60; *see also* Finding 284 (explaining that corporations and labor unions do not use the "magic words" in sham issue advertisements in order to avoid source restrictions).

[126] According to the Party Expenditures Provision, 2 U.S.C. § 441a(d)(3), in elections for the United States Senate, and for elections to the House of Representatives in states entitled to only one House Representative, parties are limited to spending the greater of $20,000, adjusted for inflation, or two cents multiplied by the voting age population of the State where the election is held. In states entitled to more than one House Representative, the coordinated expenditure limit for House campaigns is $10,000, prior to adjustment for inflation. In 2000, the coordinated expenditure limit for House campaigns was $33,780 per party. The limits for Senate races were as high as $1,626,438 (the coordinated expenditure limit for the California Senate race). *See* Press Release, Federal Election Commission, FEC Announces 2000 Party Spending Limits (Mar. 1, 2000).



forcing national parties, in effect, to choose between making coordinated expenditures and unlimited independent expenditures on behalf of their federal candidates. The defendants contend that such a choice is necessary, because once a national party coordinates with a candidate, no expenditure thereafter is truly independent.[127] While I agree that Congress can constitutionally place restrictions on the ability of a national party to make coordinated expenditures, Section 213's restriction on national party independent expenditures flies in the face of the Supreme Court's holding in *Colorado I*, and is therefore unconstitutional.[128]

The provisions of Section 213 are, as plaintiffs acknowledge, "relatively straightforward." McConnell Opening Br. at 85. After the date on which a party nominates its candidate, if it first makes an independent expenditure on behalf of that candidate, any subsequent coordinated expenditure will be subject to the same $5,000 limitation that exists for multicandidate committee expenditures, and not under the higher limitation set forth in formula form in the Party Expenditure Provision of Section 441a(d) of FECA. Conversely, if the party chooses to first make a coordinated expenditure on behalf of a candidate, thereby taking advantage of the higher, formula-based dollar limitation under the Party Expenditure Provision, it cannot thereafter make *any* independent expenditures on behalf of that candidate. Additionally, Section 213 treats "all political

[127] *See* Intervenors Opening Br. at 147 (citing Senator McCain, who explained that Section 213 "helps to ensure that the expenditure [of the national political party] will be truly independent . . . by prohibiting a party from making coordinated expenditures for a candidate at the same time it is making independent expenditures for the same candidate." 149 Cong Rec. S2144 (daily ed. Mar. 20, 2002)).

[128] While Judge Henderson agrees with us in the result, she writes separately to state her reasons for doing so. *See* J. Henderson Op. at Part IV.C.

committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee)" as a "single political committee." Finally, Section 213 forbids transfers, assignments, and receipt of funds by a committee of a political party that has made a coordinated expenditure for a federal candidate to a political party committee "that has made or intends to make an independent expenditure with respect to the candidate." BCRA § 213; FECA § 315(d); 2 U.S.C. § 441a(d).

Plaintiffs argue that the practical effect of Section 213 is to "ban political parties from making independent expenditures *at all* (if they choose to make coordinated expenditures first), and to ban them from making coordinated expenditures *at all* (if they choose to make independent expenditures first)." McConnell Opening Br. at 86. As to the latter claim, plaintiffs undoubtedly exaggerate Section 213's reach. While it is clear that it does prevent national party committees that have made an independent expenditure on behalf of a federal candidate from making coordinated expenditures up to the increased amount as calculated under the formula in 2 U.S.C. § 441a(d), they are still able nonetheless to make coordinated expenditures (or contributions) up to the $5,000 limitation provided in 2 U.S.C. § 441a(a)(2), just like any other multicandidate committee. Thus, since the national political parties may still make coordinated expenditures after making an independent expenditure first, the real issue before this Court is the constitutionality of Congress's new provision prohibiting national political party committees from making independent expenditures if it has first made a coordinated expenditure on behalf of a federal candidate. Applying a strict scrutiny review to this prohibition,[129] I find that Section 213's

[129] In *Colorado I*, the Supreme Court, citing *Buckley*, stated that "restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and 'represent substantial . . . restraints on the quantity and diversity of political speech.' " *Colorado I*, 518 U.S. at 615 (citing *Buckley*, 424 U.S. at 19).



restriction on independent expenditures by national political parties is unconstitutional.

The Supreme Court made clear in *Colorado I* that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates or other political committees," 518 U.S. at 616, and it cannot therefore be restricted unless the expenditures pose "special dangers of corruption."[130] *Id.* Despite the FEC's contention in *Colorado I* that "all party expenditures should be treated as if they had been coordinated *as a matter of law*" because "'party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election,'" the Supreme Court found that no such risk of corruption existed. 518 U.S. at 619, 620 (citing the brief of the FEC). "[T]he constitutionally significant fact" upon which the Supreme Court relied to determine that national political parties could, like any other political speaker, exercise their First Amendment right to make independent expenditures without posing a risk of corruption, "is the *lack of coordination* between the candidate and the source of the expenditure." *Id.* at 617 (emphasis added). Absent such evidence, the Supreme Court refused to accept "as a factual matter" the FEC's

[130] Specifically, the Court considered whether the parties' use of donor contributions to fund independent expenditures, or the possibility that national parties might funnel donors' contributions to candidates through independent expenditures in an effort to evade the individual contribution limits, presented a risk of corruption. *Id.* at 616-17.

contention that all expenditures by a party were *ipso facto* coordinated.[131] *Id.* at 621.

Section 213 conditions a party's exercise of its First Amendment right to make independent expenditures upon its having refrained from engaging in coordinated expenditures

[131] While acknowledging that national political parties have a First Amendment right to make independent expenditures, the defendants also contend that *Colorado I* narrowly defines that right. According to the defendants, *Colorado I* stands for the proposition that a national political party may make independent expenditures *only if* the party has not yet selected its nominee. *See* Intervenors Opening Br. at 148-49. The defendants further argue that the Supreme Court's opinion in *Colorado II* confirms their interpretation when it states that "the Members of the Court who joined the principal opinion [in *Colorado I* ] thought the payments were 'independent expenditures' as that term had been used in our prior cases, owing to the facts that the Party spent the money before selecting its own senatorial candidate and without any arrangement with potential nominees." *Id.* at 439 (citing *Colorado I*, 518 U.S. at 613-14). In advocating this argument, however, the defendants have accorded mere dicta in *Colorado I* the power of precedent. I do not find that *Colorado I* conditions a party's First Amendment right to make independent expenditures upon whether or not the party has selected its nominee. While the Supreme Court in *Colorado I* mentions "that at the time of the expenditure, the Party had not yet selected a . . . nominee," *id.* at 613-14, it did so only in its review of the summary judgment record in order to determine if a genuine issue of fact existed as to whether the Party's expenditure was coordinated. Though the fact that the Party had not yet selected its nominee was an important factor in the Court's determination that the expenditure was independent, the Supreme Court placed equal, if not greater, weight on the lack of interaction between the Party's nominee and the Party at the time the expenditure was made. *See Colorado I*, 518 U.S. at 614. The fact that the Party had not chosen its nominee is neither the sole underpinning of this factual conclusion, nor of the Supreme Court's holding that national political parties have a First Amendment right to make unlimited independent expenditures. *See id.* at 618-19 ("We do not see how a Constitution that grants individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."). *Colorado II* does not hold or find otherwise.



up to the limit of the Party Expenditures Provision. Defendants' argument that "[p]roviding . . . an option, which a party committee is free to accept or decline, does not constitute a restriction of First Amendment rights" is, at best, fanciful. Gov't Opening Br. at 180.[132] By mandating that a party that has made a coordinated expenditure cannot thereafter make independent expenditures, BCRA leaves national political parties with the familiar predicament of only being able to make expenditures up to the Party Expenditure Provision limits set forth in 2 U.S.C. § 441a(d). Indeed, this is the very situation the Supreme Court found unconstitutional in *Colorado I*.

Defendants have produced no evidence of "special dangers of corruption" posed by national parties making an independent expenditure after having made one or more coordinated ones. At most this Court is presented with defendants' own speculation and suspicion that all expenditures made after a coordinated expenditure are necessarily coordinated between candidate and party. Of course, if they had such evidence of corruption or potential corruption, then restrictions on the independent expenditures of national parties might possibly be warranted. However, the nature of the defendants' concerns about coordination between parties and candidates[133] are such that they can file a

[132] The defendants describe the ban on independent expenditures as the price national parties must pay to take advantage of the "special privilege" of making coordinated expenditures at the increased rate set forth in 2 U.S.C. § 441a(d), a privilege available only to national parties and not to individuals, candidates, or other political speakers. Although I do not disagree with the defendants' assessment of the Party Expenditure Provision as a "special privilege," I find unconstitutional BCRA's conditioning of this privilege on the national party forgoing its First Amendment rights.

[133] *See* Intervenors Opening Br. at 149, 149 n.537 The defendants only offer anecdotal declarations of former and current Members of Congress as well as documents produced by the national parties to support their

complaint with the FEC challenging whether a party's expenditure on behalf of a candidate is, in fact, independent. A complete ban on all party independent expenditures after a coordinated expenditure has occurred is just not sufficiently tailored to deal with that type of problem. Moreover, Section 213's ban on independent expenditures treats national political parties differently than other political actors even though, as mentioned previously, a party's independent expenditures are no less protected as First Amendment activity than that of others. *See Colorado I*, 518 U.S. at 616.

Having rejected Section 213's ban on independent expenditures for parties that have first made coordinated expenditures, I find it unnecessary to reach the constitutionality of the two remaining provisions of Section 213: the provision treating all committees of a party as a single committee, and the provision forbidding transfers and receipt of funds between committees of a political party. Even if I found those provisions to be constitutional, I do not believe—after finding the ban on independent expenditures unconstitutional— that a saving construction can be applied to Section 213 so that it is consistent with Congress's clear intent to provide a choice to parties between unlimited independent expenditures and coordinated expenditures up to

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contention that the "evidentiary record . . . amply supports Congress's expert judgment that, when a party chooses to coordinate efforts with its nominee, it cannot claim at the same time to be making expenditures that are truly independent of that nominee." *Id.* at 149. For example, defendants point to the declaration of Senator McCain who stated that parties and candidates "generally communicate and coordinate on a regular basis on a variety of topics," so that "[t]he idea that a party could make both 'coordinated' and 'independent' expenditures once the party has nominated a candidate, is not sensible."



the Party Expenditure Provision limit.[134] Applying a saving construction to the statute that would allow only one option, but not the other, would flout that intent. Therefore, for the reasons set forth above, Section 213 of BCRA is, in our judgment, unconstitutional.

III. Section 318: Prohibition of Donations by Minors

I concur in the judgment of Judge Henderson and Judge Kollar-Kotelly that Section 318, which prohibits children from making contributions to candidates or donations to political parties,[135] is unconstitutional. I write, however, only

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[134] *See* 148 Cong. Rec. S2096-02, S2144 (Mar. 20, 2002) (statement of Senator McCain). Senator McCain stated:

> Section 213 of the bill allows the political parties to choose to make either coordinated expenditures or independent expenditures on behalf of each of their candidates, but not both. This choice is to be made after the party nominates its candidate, when the party makes its first post-nomination expenditure—either coordinated or independent—on behalf of the candidate. . . . This provision fully recognizes the right of the parties to make unlimited independent expenditures. But it helps to ensure that the expenditure will be truly independent, as required by Colorado Republican I, by prohibiting a party from making coordinated expenditures for a candidate at the same time it is making independent expenditures for the same candidate. We believe that once a candidate has been nominated a party cannot coordinate with a candidate and be independent in the same election campaign. After the date of nomination, the party is free to choose to coordinate with a candidate, or to operate independently of that candidate. If it chooses the former, it is subject to the limits upheld in Colorado Republican II. If it chooses the latter, it is free to exercise its right upheld in Colorado Republican I to engage in unlimited hard money spending independent of the candidate.

[135] Section 318 states: "An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party." BCRA § 318; FECA § 324; 2 U.S.C. § 441k.

to explain why I believe this Court should evaluate this provision under the strict-scrutiny standard of review.

If Section 318 were a complete ban on adults, instead of on minors, Supreme Court precedent would require us to review such a provision under the strictest of scrutiny. Indeed, one of the primary reasons that the Supreme Court reviewed contribution limitations in *Buckley* under the less-demanding closely-drawn standard of review was because contribution limitations permit some expression of support. 424 U.S. at 20-21. A complete ban on donations, on the other hand, prevents even a symbolic expression of support for a candidate or a party's agenda. *Id.* Similarly, Section 318 merits heightened scrutiny regardless of the age of those it silences. Simply stated, the standard of review applied by this Court should be a function of the constitutional rights being infringed upon, rather than the age of those whose rights are being infringed.

Children, like adults, are protected by the Constitution.[136] The Supreme Court, however, has made clear that minors in certain circumstances should not be treated in the same way as adults, repeatedly upholding laws that treat them differently.[137] Because the treatment of minors by the

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[136] *See Bellotti v. Baird*, 443 U.S. 622, 633, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution. . . . 'whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill or Rights is for adults alone.'" (quoting *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967))); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

[137] *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (upholding school's decision to punish student using obscene language); *Ginsberg v. New York*, 390 U.S. 629, 638, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding criminal conviction under New York statute that prohibited the selling of sexually oriented magazines to minors).



Supreme Court has varied across a wide range of circumstances, lower courts have had to wrestle with some uncertainty in assessing when the state's power can trump the rights of children, but not those of adults. Indeed, the Supreme Court itself acknowledged that uncertainty: "The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." *Carey v. Population Services International*, 431 U.S. 678, 692 (1977). Two years later the Supreme Court shed greater light on the matter in *Bellotti v. Baird*, when it identified certain reasons that justify the disparate treatment:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot equated with those of adults: the peculiar vulnerability of children; their inability to make critical decision in an informed, mature manner; and the importance of the parental role in child rearing.

443 U.S. at 634.

While these reasons provide clearer guidance on when children can be treated differently from adults, they do not, however, explain whether a court, having found one of those reasons present, should employ a lesser standard of review in evaluating children's constitutional rights or merely rely upon one of the reasons as a factor in recognizing a government interest justifying the regulation. In this jurisdiction, the D.C. Circuit seemingly answered that question for certain circumstances.

In *Hutchins v. D.C.*, where the D.C. Circuit upheld the District of Columbia's imposition of a curfew on minors, 188 F.3d 531, 541 (1999) (en banc), the Circuit Court, in applying

the *Baird* reasons, concluded that children may be more "vulnerable to harm during curfew hours than adults," "are less able to make mature decisions in the face of peer pressure, and "are more in need of parental supervision during curfew hours." *Id.* For those reasons, it decided to review the curfew statute under intermediate scrutiny and found the curfew was substantially related to the achievement of important government interests. *Id.* Here, however, I do not believe that we should lower the level of scrutiny. In *Hutchins,* and other cases in which courts applied a lesser standard of review, the courts identified paternalistic state interests in protecting children from harm; or acting *in loco parentis.* The D.C. Circuit, in *Hutchins,* was particularly concerned that children are "vulnerable to harm during curfew hours." *Id.* And in cases concerning decisions by children that affect procreation—cases in which the Supreme Court has applied a lesser standard of review—the Court has been equally concerned that children may make decisions that harm themselves.[138]

Section 318 of BCRA was not drafted out of a concern to safeguard children against harming themselves in the absence of their parents (i.e., the state acting *in loco parentis*), but to prevent parents from using their children to circumvent existing donation limitations to political parties and politicians. Because it involves political expression, this case is not unlike *Tinker v. Des Moines Independent Community School District,* in which the Supreme Court rejected a school district's attempt to discipline students wearing black

[138] For example, in *Planned Parenthood of Central Missouri,* the Court reviewed a parental consent provision for abortions under lesser scrutiny, explaining that it must "examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis* that is not present in the case of an adult." 428 U.S. at 75; *see also Carey,* 431 U.S. at 693 n. 15 (applying lesser scrutiny to contraceptive regulation of minors).



armbands to express their opposition to the Vietnam War. 393 U.S. 503 (1969). Even in a case where the students were in the custody of the state, the Supreme Court recognized that the speech caused no harm to, nor interrupted the learning of, the state's charges. *Id.* at 508-09. It emphasized that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect." *Id.* at 511. Such cases involving government interests, unrelated to the protection of children, do not warrant review under any scrutiny less than strict. The political expression of children, especially if they are old enough to work and pay taxes, surely deserves the same level of constitutional scrutiny as a young adult old enough to attend college and vote.

This does not mean, of course, that thegovernment need entirely ignore the fact that some children do not possess "that full capacity for individual choice which is the presupposition of First Amendment guarantees," *Ginsberg,* 390 U.S. at 649-50, and that they sometimes cannot make "critical decisions in an informed, mature manner," *Baird,* 443 U.S. at 634. It simply means that the government, and the courts, can take into account these concerns when evaluating whether there is in fact a compelling government interest. Here, for example, the government could claim that children under thirteen who generally have no means independent of their parents and rarely make financial decisions independent of their parents, are vulnerable to being represented by their parents as having made donations which, in effect, circumvent contribution limits. If there were in fact more substantial evidence of such circumvention, *see* J. Kollar-Kotelly Op. at Part III.III, and the provision were more narrowly tailored to serve the circumvention concern, *see* J. Henderson Op. at Part IV.E, then restrictions, which are somewhat more onerous on children than on adults given a child's lack of independence, may be justifiable based on a compelling government interest. That is not the case here. For

these reasons and for those set forth, in part, by Judge Kollar-Kotelly and Judge Henderson, I agree that the prohibition on donations by children is unconstitutional.

IV. Section 504: Public Access to Broadcasting Records

Section 504 requires broadcast licensees to collect and disclose records of any "request to purchase broadcast time" that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to Federal office," and "a national legislative issue of public importance." BCRA § 504; FECA § 315(e)(1); 47 U.S.C. § 315(e)(1).[139] Since "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," *Buckley*, 424 U.S. at 66, the Supreme Court insisted that any law compelling disclosure of campaign information must be reviewed under "exacting scrutiny," *id.* at 64, such that the government interest served is "substantial," *id.* at 80, and "sufficiently important to outweigh the possibility of infringement," *id.* at 66. For the following reasons, I find that the record does not establish the existence of a substantial governmental interest necessary to warrant the disclosure requirements set forth in Section 504.

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[139] The record must include whether the request to purchase was accepted or rejected; the rate charged for the broadcast; the date and time on which the communication aired; the class of time that is purchased; the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers; in the case of a request on behalf of a candidate, the name of the candidate, the authorized committee, and the treasurer of the committee; and in the case of any other request, the name of the person purchasing the time, the name and contact information for such person, and a list of chief executive officers or members of the executive committee or board of directors. BCRA § 504; FECA § 315(e)(1); 47 U.S.C. § 315(e)(1).



Section 504 is different from the other disclosure provisions in BCRA in two important ways: (1) broadcast licensees, not the purchasers, are required to make the disclosures; and (2) the disclosures are required for broadcasts on "political matters of national importance" as well as on federal candidates. In relation to disclosure of communications by, and relating to, federal candidates, the government has provided no evidence that Section 504 serves any of the government interests specified in *Buckley*.[140] Indeed, Section 201, which this Court finds constitutional in part, already requires purchasers of "electioneering communications" to disclose a wide array of information, including the amount of each disbursement and the elections to which the electioneering communications pertain. BCRA § 201(a); FECA § 304(f)(2); 2 U.S.C. § 434(f)(2). These disclosure requirements for purchasers in Section 201 mirror many of the provisions for broadcast licensees in Section 504, and the defendants have provided no evidence that such a belt-and-suspender approach is necessary. Moreover, they have provided no evidence suggesting, let alone proving, that purchasers have evaded, or will evade, disclosure requirements. And though the defendants made an offhanded reference to the importance of ensuring that broadcast requests are processed in an "even-handed fashion," Gov't Opp'n Br. at 134-35, there is nothing in the record which

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[140] In *Buckley*, the Supreme Court outlined several sufficient government interests justifying disclosure requirements including informing voters about how candidates spend money so that they can better evaluate candidates, 424 U.S. at 66-67 (noting that disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches"), deterring actual corruption and avoiding the appearance of corruption, *id.* at 67 (explaining that "exposing large contributions and expenditures to the light of publicity" fights corruption), and gathering data to detect violations campaign finance laws, *id.* at 67-68.

demonstrates that broadcast licensees have treated purchasers unfairly.

As to noncandidate-focused communications which supposedly relate to "political matters of national importance" (e.g., "a national legislative issue of public importance"),[141] disclosure requests are even more difficult to justify. First, such disclosure requirements fail to serve any of the three sufficient government interests set forth in *Buckley* because those interests are specific to evaluating, and preventing corruption of, federal candidates. *See supra* note 135. Second, the defendants' contention that there is a substantial government interest in helping the public identify the sponsors of political broadcasts and evaluate the credibility of the political message, *see* Gov't Reply Br. at 89-90, does not quite square with the holding in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). In *American Constitutional Law Foundation*, the Supreme Court did recognize a substantial government interest in disclosing the names and addresses of ballot-initiative proponents who pay circulators to collect signatures, explaining that disclosure was "a control or check on domination of the initiative process by affluent special interest groups." *Id.* at 202. Here, however, the defendants have provided no evidence that "special interest groups" have, as yet, dominated or co-opted broadcast communications relating to political issues of national importance. *See id.* at 203 (refusing to require disclosure of petition circulators' names and amounts paid because the "lower courts fairly determined from the record as a whole" that the benefit of such information had not been demonstrated).

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[141] Any understanding of broadcasts "relating to any political matter of national importance" necessarily includes broadcasts above and beyond those referring to federal candidates. Though, as the plaintiffs contend, the scope of those required disclosures is unclear because of the language's vagueness.



Absent such evidence, the government lacks a constitutionally acceptable justification to enact a disclosure provision that imposes an onerous collection and disclosure system on broadcast licensees; infringes the associational rights of groups and their members who engage in broadcasting; and potentially curtails political speech invaluable to an informed electorate. In *Buckley v. Valeo*, the D.C. Circuit rejected FECA Section 437a, a disclosure requirement that also encompassed "completely nonpartisan public discussion of issues of public importance." *See Buckley v. Valeo*, 519 F.2d 821, 870, 869-78 (D.C. Cir. 1975).[142] In so doing, the court explained:

> [I]ssue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.

*Id.* at 873. I could not agree more. In the absence of evidence that disclosure of nonelection-related broadcasts serves a substantial government interest, Section 504 cannot withstand scrutiny.

## V. Findings of Fact

Despite our best efforts to produce a complete set of Findings of Fact, in which two or more members of this Court concur, we were unable to do so.

Because of the critical importance of the facts to the holdings in the case, and the sheer enormity of the record developed by the parties, I believe it necessary to set out, for

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[142] The D.C. Circuit's decision on Section 437a was not appealed. *See Buckley*, 424 U.S. at 10 n. 7.

the most part,[143] those facts which in my judgment are sufficiently relevant and probative to rely upon in reaching my conclusions. Accordingly, while there may be other relevant and probative facts in the record, I do not accord them sufficient weight to warrant either relying on them in my judgments, or including them in my Findings.

Moreover, in some instances where evidence was submitted by one side or another (or both) on a particular point, but in my judgment that evidence did not meet this standard, I have either commented specifically to that effect, or simply stated that there was "no probative evidence in the record" as to that point. In other instances, where I accorded great weight to the relevant and probative evidence submitted on a particular point, I have specifically acknowledged that that evidence was "substantial" or "overwhelming" as to that point. In those limited circumstances where the evidence submitted by one side was not controverted by the other, I have acknowledged the "uncontroverted" nature of the evidence on that point.

Finally, I would be remiss to not acknowledge the herculean effort expended by the parties in assembling this

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[143] In those sections where I have concurred in the judgment and reasoning of one of my colleagues, she may be basing her opinion on her individual Findings of Fact that relate to that section. Unless otherwise necessary, I have, to the extent possible, refrained from repeating those findings in my Findings of Fact. Hence, to that extent, my set of Findings does not include *all* of the facts that I have relied upon in reaching my various judgments. Finally, in a footnote to the introduction of her Findings of Fact, Judge Henderson comments that she has a "'definite and firm conviction that a mistake has been committed' with respect to several of [the] findings" in Judge Kollar-Kotelly's and my opinions. J. Henderson Op. at Part III.B (citing *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001)). Two of the five examples she lists thereafter are Findings 292 and 250 of my opinion. Because Judge Henderson does not explain why either one or both of these Findings are "mistaken," I am not in a position to respond to her concerns.



"elephantine"[144] record over a seven-month time period. It is a testament, indeed, to their sense of professionalism and duty on a matter of utmost importance to our system of government. Moreover, the job of reviewing and evaluating this record would have been substantially more difficult, and less reliable, in my judgment, if they had not assembled these factual materials with such extraordinary care.

That said, upon reviewing the record as a whole, I make the following Findings of Fact:

* * *

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As to BCRA's restrictions on nonfederal funds, I find that

*National Parties and Their Congressional Campaign Committees*

1. The national committees of the two major political parties are: the Republican National Committee ("RNC"); the National Republican Senatorial Committee ("NRSC"); the National Republican Congressional Committee ("NRCC"); the Democratic National Committee ("DNC"); the Democratic Senatorial Campaign Committee ("DSCC"); and the Democratic Congressional Campaign Committee ("DCCC"). Vogel[145] Decl. ¶ 6 [DEV 9-Tab 41]; McGahn[146] Decl. ¶ 6 [DEV 8-Tab 30]; Jordan[147] Decl. ¶ 6 [DEV 7-Tab 21]; Wolfson[148] Decl. ¶ 6 [DEV 9-Tab 44].

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[144] Hearing Tr. (Dec. 4, 2003) at 152 (Abrams).

[145] Alexander Vogel is General Counsel for the NRSC. Vogel Decl. ¶ 1 [DEV 9-Tab 41].

[146] Donald McGahn is General Counsel for the NRCC. McGahn Decl. ¶ 1 [DEV 8-Tab 30].

[147] James Jordan is the Executive Director of the DSCC. Jordan Decl. ¶ 1 [DEV 7-Tab 21].

[148] Howard Wolfson is Executive Director of the DCCC. Wolfson Decl. ¶ 1 [DEV 9-Tab 44].

*National Party Nonfederal Fundraising and Spending*

2. According to defendants' expert Mann

> In 1980 the national Republican party spent roughly $15 million in soft money, the Democrats $4 million. This constituted 9% of total spending by the two national parties. In 1984 the amount of soft money spent by the national parties increased marginally to $21.6 million but it constituted a smaller share (5%) of total national party activity. In 1988 . . . . [p]arty soft money spending more than doubled to $45 million, which was 11% of national party totals . . . . By 1988, both parties had developed effective means of courting large soft money donors. After the election, Republicans revealed that they had received gifts of $100,000 each from 267 donors; Democrats counted 130 donors contributing $100,000 or more . . . .

Mann Report at 12-13 [DEV 1-Tab 1] (citations omitted).

3. The 1992 election cycle was the first in which nonfederal donations were tracked by the FEC. During that cycle the Democratic and Republican parties together raised $86.1 million in nonfederal funds. During the 1994 election cycle the two major parties raised $101.6 million in nonfederal funds. During the 1996 cycle the combined total rose to $263.5 million but dropped to $222.5 million during the 1998 cycle. During the presidential election cycle of 2000 they raised a combined total of $487.5 million in nonfederal funds. In the past election cycle of 2002 cycle they raised $495.8 million in nonfederal funds. *See* Press Release, FEC, Party Fundraising Reaches $1.1 Billion in 2002 Election Cycle (Dec. 18, 2002), *available at* http:// ww.fec.gov/press/20021218party/20021218party.html.

4. There was

> a threefold increase in national party soft money activity between 1992 and 1996—from $80 million to $272 million. Soft money as a share of total national party



> spending jumped from 16% to 30%. Both parties and their elected officials worked hard to solicit soft money donations from corporations, wealthy individuals, and labor unions. During the 1996 election the national party committees received . . . approximately 27,000 contributions from federally prohibited sources . . . Less than $10 million of the $272 million was contributed directly to state and local candidates in the 1996 cycle. . . . The two parties transferred a total of $115 million in soft money to state party committees, which financed two-thirds of state party soft money expenditures. . . . State party soft money expenditures for political communication/advertising jumped from less than $2 million in 1992 to $65 million in 1996.

Mann Report at 21-22 [DEV 1-Tab 1] (citation omitted). During the 1996 election cycle, the top 50 nonfederal money donors made contributions ranging from $530,000 and $3,287,175. *Id.* at 22.[149] "The total amount of soft money spent [in the 1998 midterm election cycle]—$221 million—was less than in 1996 but more than double the previous midterm election. And soft money as a share of total spending by the national parties jumped to 34%. The congressional party campaign committees put a premium on raising and spending soft money to advance the election prospects of their candidates . . . . Both national party committees had discovered they could finance campaign activity on behalf of their senatorial candidates with soft money in the form of 'issue advocacy.' The same pattern, more pronounced with the Democrats than the Republicans, was evident in the House campaign committees." Mann Report at 23 [DEV 1-Tab 1] (citation omitted).

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[149] Four of the top 50 soft money donors to the national parties in 1999, but not 2000, were state parties. Mann Expert Report at tbl. 5, tbl. 6.

5. Defense expert Mann has reported that "soft money financing of party campaigning exploded in the 2000 election cycle. Soft money spending by the national parties reached $498 million, now 42% of their total spending. Raising a half billion dollars in soft money [in 2000] took a major effort by the national parties and elected officials, but they had the advantage of focusing their efforts on large donors. That focus paid substantial dividends: 800 donors (435 corporations, unions and other organizations and 365 individuals), each contributing a minimum of $120,000, accounted for almost $300 million or 60 percent of the soft money raised by the parties. The top 50 soft money donors ... each contributed between $955,695 and $5,949,000. Among the many soft money donors who gave generously to both parties were Global Crossing, Enron and WorldCom." Mann Report at 24-25 [DEV 1-Tab 1] (citation omitted). "A total of $280 million in soft money—well over half the amount raised by the six national party committees—was transferred to state parties [in 2000], along with $135 million in hard money." *Id.* at 26. In 2000, thirty-five of the top 50 donors were corporations. Most of the other top 50 donors were unions and plaintiff attorneys. Mann Expert Report at tbl. 6.

6. During the first 18 months of the 2001-2002 election cycle the parties reported nonfederal receipts of $308.2 million, which is a 21 percent increase over the same period during the 1999-2000 cycle. The FEC notes that this increase is "all the more significant given that typically parties raise more in Presidential campaign cycles than in non-presidential campaigns." Press Release, FEC, Party Fundraising Growth Continues (Sept. 19, 2002), *available at http://www.fec.gov/press/20020919*-partyfund/20020919partyfund.html. By October 16, 2002, the parties had raised over $421 million in nonfederal funds. Press Release, FEC, National Party Fundraising Strong in Pre-Election Filings (Oct. 30, 2002), *available at* http:// www.fec.gov/press/20021030party pre.html/20021030partypre.html.



7. Experts attribute the accelerated rise in nonfederal money expenditures to President Bill Clinton and his political consultant Dick Morris' use of such funds during the 1996 campaign to fund

> television ads designed to promote Clinton's reelection. While the ads prominently featured the President, none of these costs were charged as coordinated expenditures on behalf of Clinton's campaign. Instead the party paid the entire cost, based on a legal argument never before made: that party communications which did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising and financed, according to the FEC allocation rules, with a mix of soft and hard money.

Mann Report at 18 [DEV 1-Tab 1]. Defense Expert David Magleby notes that this development

> ran counter to the stated purposes of soft money which were to permit parties to raise unlimited amounts of money for 'party building' purposes, unlike hard money which is subject to the contribution limits given to the parties to help elect or defeat candidates. . . . The strategy to deploy soft money for these purposes is described in a series of memos from Dick Morris. . . . Morris says, "I met with . . . attorney[s] . . . and explained the kinds of ads I had in mind. Fortunately, they said the law permitted unlimited expenditures by a political party for such "issue-advocacy" ads. By the end of the race, we had spent almost thirty-five million dollars on issue-advocacy ads (in addition to about fifty million dollars on conventional candidate-oriented media), burying the Republican proposals and building a national consensus in support of the president on key issues."

8. Magleby Expert Report at 11 (quoting Dick Morris, Behind the Oval Office: Getting Reelected Against All Odds

141, 624 (1999) [DEV 4-Tab 8]. "The national Democratic party managed to finance two-thirds of its pro-Clinton 'issue ad' television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft dollars to party committees in the states they targeted and had the state committees place the ads." Mann Expert Report at 22 [DEV 1-Tab 1]; *see also* Plaintiff's Expert Raymond La Raja Dep. Exhibit 3 at 14, 37-48 [JDT 15] (Raymond Joseph La Raja, American Political Parties in the Era of Soft Money (2001) (unpublished Ph.D. dissertation, University of California at Berkeley) (discussing the emergence of "party soft money").

9. According to Defense experts, "It did not take the Republican party long to respond in kind by promoting Bob Dole and Jack Kemp." Magleby Expert Report at 11 [DEV 4-Tab 8].

> In May of 1996, the Republican National Committee announced a $20 million "issue advocacy" advertising campaign. Its purpose, in the words of the chairman, would be "to show the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country, so we can engage full-time in one of the most consequential elections in our history." These presidential candidate-specific ads, like the Democratic ones, were targeted on key battleground states and financed with a mix of hard and (mostly) soft money. Both parties were now financing a significant part of the campaigns of their presidential candidates outside of the strictures of the FECA and well beyond the bounds of the 1979 FEC ruling that national parties may raise corporate and union funds and solicit unlimited donations from individuals "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office."

Mann Expert Report at 20 (citation omitted) [DEV 1-Tab 1].



10. This approach for the use of nonfederal funds spilled over into congressional races. Mann Expert Report at 20 [DEV 1-Tab 1]; *see also* Lamson[150] Decl. ¶ 9 (describing both parties' national committees' use of soft money to run advertisements in a race for Congress in Montana).

*Senator McConnell*

11. Senator McConnell routinely participates in political and fundraising events for state and local candidates and party committees.

12. Since his election to the Senate, Senator McConnell has been a member of the NRSC, which promotes the Republican position on a wide range of issues and supports Republican candidates at the federal, state, and local levels. Senator McConnell chaired the NRSC in the 1998 and 2000 election cycles and, as chairman, he raised funds not subject to the restrictions and prohibitions of federal law. These nonfederal funds were used for voter registration and identification, get-out-the-vote activities, "issue advocacy," building funds, and national support for state and local candidates. As NRSC Chairman, Senator McConnell directed nonfederal NRSC

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[150] Since January 2001, Lamson has served as the Communications Director for the Office of Public Instruction of the State of Montana, a post he also held from early 1997 until January 2000. During 2000, Lamson managed Nancy Keenan's campaign to represent Montana's Congressional district. During 1996, Lamson managed Bill Yellowtail's campaign to represent Montana's congressional district. From 1983 through 1996, Lamson served as the state director for United States Representative Pat Williams' congressional office in Montana. During this same period, Lamson also managed Congressman Williams' election campaigns in Montana. From 1981 to 1983, Lamson was Executive Director of the Montana Democratic Party. Lamson provided a sworn declaration in *Colorado Republican Fed. Campaign Comm. v. FEC*, 41 F.Supp.2d 1197 (D.Colo.1999), *aff'd*, 213 F.3d 1221 (10th Cir.2000), *rev'd*, 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001). Lamson Decl. ¶¶ 2-3 [DEV 7-Tab 26].

donations to dozens of state and local candidates, including Virginia Republican gubernatorial candidate Jim Gilmore (in 1997); California Republican gubernatorial candidate Dan Lungren (in 1998); and the Republican candidate for mayor of Warwick, Rhode Island (in 2000). *Id.* ¶ 8.

13. The overwhelming majority of the people with whom Senator McConnell has met during his tenure in the Senate do not donate funds to the Republican Party at the national, state, or local level. Typically Senator McConnell is unaware of the donation history of the individuals with whom he meets. *Id.* ¶ 13.

*Thomas McInerney*

14. Thomas McInerney, a resident of New York, shares the Republican Party's general philosophy on policy issues such as lower taxes, smaller government, free trade, and a strong national defense. He has pursued his political and public policy goals by making donations to Republican organizations at the national, state, and local levels in order to promote Republican principles and candidates at the federal, state, and local levels. McInerney Aff. ¶¶ 2-3.

15. Prior to BCRA's enactment in 2002 McInerney donated amounts in excess of BCRA's aggregate amount limit of $57,500 per cycle to the national political party committees of the Republican Party and in excess of $10,000 per year to state and local Republican party organizations. His donations were intended to support state and local candidates voter registration activities for state and local parties; voter identification activity; get-out-the-vote activity; generic campaign activity for state and local parties, including broadcast communications that promote the Republican party when a federal candidate is on the ballot; slate cards, palm cards, and sample ballots for state and local parties; absentee ballot programs for state and local parties; phone bank programs for state and local parties; public communications



discussing policy issues, including communications that mention federal candidates in a manner that could be construed to "promote, support, attack or oppose" such candidates; staff salaries of employees who spend 25 percent of their time in any given month on any of these activities. *Id.* ¶ 4.

16. In the 2002 election cycle McInerney donated more than $57,500 to Republican Party organizations at the national, state, and local levels "to be used on certain activities" described above. *Id.* ¶ 10.

17. In the 2000 election cycle McInerney donated more than $57,500 to Republican Party organizations at the national, state, and local levels "to be used on certain activities" described above. *See Id.* ¶ 12.

18. McInerney's support for Republican Party organizations at the national, state, and local levels reflect his shared philosophy and values with the Party.

19. Nothing in the record suggests that McInerney's support for the Republican Party at the national, state, and local levels is dependent upon gaining access to federal officeholders. McInerney would support the Republican Party whether or not he was solicited by a federal officeholder and whether or not his contribution resulted in attendance at an event that included federal officeholders. *See id.* ¶ 17.

*The Role of Political Parties in Democracies*

20. Both sides experts testify that political parties play a critical role in democracies. *See* Mann Expert Report at 28 ("Political parties play an indispensable role in democratic societies . . . ."); Krasno & Sorauf Expert Report at 21-22 ("While most political scientists may not literally agree with E.E. Schattschneider that 'parties created democracy, and . . . democracy is unthinkable save in terms of parties' they would recognize and appreciate the sentiment. We certainly place ourselves in their number."); La Raja Decl. ¶ 11 ("Political

parties are essential institutions in democracies."). Experts testify that political parties have played and continue to play certain critical roles in helping us to maintain a stable political order.

21. First, they note that the parties have coordinated and reconciled various national, state, and local entities within our federal system of government. *See* Milkis Expert Report at 13-14; Keller[151] Expert Report at 6-7.

22. Next, they state that the parties encourage "democratic nationalism" by nominating and electing candidates and by engaging in dialogues concerning public policy issues of national importance. Milkis Expert Report at 14-19. An example of this is the RNC's recent participation in public policy debates concerning a balanced budget amendment, welfare reform, and educational policy. *See* Josefiak[152] Decl. ¶ 91; RNC Exhibit 1711, Exhibit 2428, Exhibit 2440.

23. Experts note that the parties recruit and nominate candidates, aggregate public preferences, and provide a means of democratic accountability. *See* D. Green Expert Report at 7; Magleby Expert Report at 33; Mann Expert Report at 28. Political scientists also credit parties with increasing voter turnout, encouraging volunteer grassroots political participation, fostering broader electoral competition by supporting challengers against incumbents, and diluting the influence of organized interests. *See* Cross Exam. of Green at 83-84; Cross Exam. of Mann at 53; Keller Expert Report at 5-6; Milkis Expert Report at 12-13; La Raja[153] Expert Report at 5, 7-8.

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[151] Sidney Milkis and Morton Keller are experts for the plaintiffs.

[152] Thomas Josefiak is Chief Counsel of the RNC. Josefiak Decl. ¶ 1.

[153] Raymond La Raja is one of plaintiffs' experts.



24. Plaintiffs' expert Keller states that party competition in general is healthy for democracy; it was a major force behind the expansion of the electorate through the enfranchisement of blacks in the South, reduction of the voting age to eighteen, and the elimination of poll taxes and other constraints on voting registration. *See* Keller Expert Report at 15. Intense competition among the post-Civil War parties led to increased voter turnout and close presidential elections. *See id.* at 11-12.

25. In addition, experts find that the parties act as critical agents in developing consensus in the United States. *See* Milkis Expert Report at 19. In the words of one defense expert, parties are "the main coalition building institution[s] . . . by a good measure." Cross Exam. of Green at 84; *see* Cross Exam. of Mann at 53, 56 ("[n]o other group could come close to political parties" in moderating extreme views); Krasno & Sorauf[154] Expert Report at 24 ("Parties with their necessary 'big tent' compete for the allegiances of multiple groups . . . .").

26. Furthermore, experts find that the parties cultivate a sense of community and collective responsibility in American political culture. *See* Milkis Expert Report at 19-21; La Raja Expert Report at 3-4. Parties have been integral in forming a consensus on publicly divisive issues. *See* Milkis Expert Report at 4.

27. Finally, it is also noted by experts that it is a major purpose of the political parties to elect candidates to office. *See* Bumpers[155] Decl. ¶ 4 [DEV 6-Tab 10]; Wolfson Decl. ¶ 6 [DEV 9-Tab 44]; Jordan Decl. ¶ 6 [DEV 7-Tab 21]; Shea

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[154] Jonathan Krasno and Frank Sorauf are experts for defendants.

[155] Senator Dale Bumpers served two terms as Governor of Arkansas, from 1971 to 1975. After his service as Governor, he served as a Member of the United States Senate, representing the State of Arkansas, from 1975 to 1999. Bumpers Decl. ¶ 2 [DEV 6-Tab 10].

Dep. Tr (Sept. 24, 2002) at 15, 88-90; Knopp Cross Tr. at 10; Brister Decl. ¶ 4 ("The Republican Party of Louisiana's primary purpose is to help elect Republicans to office 'from the courthouse to the White House'"); ODP0021-02001-19, ODP0021-02386-90, ODP0025-02641-45 [DEV 70-Tab 48] (internal RNC Memoranda from then-Chairman Haley Barbour); RNC's Resp. to FEC RFA's in RNC, No. 40 [DEV 68-Tab 35]; ODP0021-02003 [DEV 70-Tab 48] (RNC Chairman Haley Barbour stated: "The purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president. . . . Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures."); *see generally* ODP0021-02001 to 19; ODP0021-02386 to 90; ODP0025-02641 to 45 [DEV 70-Tab 48] (internal RNC memoranda from then-Chairman Haley Barbour).

*Republican National Committee*

28. As a national party, the RNC has historically participated and participates today in electoral and political activities at the federal, state, and local levels. According to its general counsel, "[t]he RNC's national focus should not be misunderstood as a federal focus." *See* Josefiak Decl. ¶¶ 19, 41-59. The RNC seeks to advance its core principles—a smaller federal government, lower taxes at all levels of government, individual freedom, and a strong national defense—by promoting an issue agenda advocating Republican positions, electing Republican candidates, and encouraging governance in accord with these Republican views. *See* Josefiak Decl. ¶ 22; *see also* La Raja Expert Report ¶¶ 11, 16.

29. In pursuit of its objectives, the RNC engages in frequent communications with its members, officeholders, candidates, state and local party committees, and the general public. These communications occur both during campaign



seasons and at all other times. *See* Banning[156] Decl. ¶¶ 28(d)-28(f); Josefiak Decl. ¶¶ 88-89, 100-101.

*The RNC's Federal Election Activities*

30. The RNC, and its national party committees, engage in a wide range of activities that influence federal elections. For example, the RNC spends federal funds on: (i) recruiting and training candidates; (ii) contributing to federal candidate campaign committees; (iii) making coordinated expenditures on behalf of federal candidates; (iv) making communications calling for the election or defeat of federal candidates; (v) funding, in part, research and issue development; and (vi) funding, in part, voter registration, voter identification, and get-out-the-vote campaigns. *See* Banning Decl. ¶ 28(d); Josefiak ¶¶ 26, 35, 89; *see also* La Raja Decl. ¶ 11(d); Magleby Expert Report at 33-34. Prior to the enactment of BCRA, some of these activities were funded only with federal money; others were funded with a combination of federal and nonfederal money.

*National Party Use of Nonfederal Money to Benefit Federal Candidates*

31. Nonfederal money is often given to national parties with the understanding that it will be used to assist the campaigns of particular federal candidates, and, indeed, it is often used for that purpose.

32. Senator Simpson[157] testified that "[d]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician.

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[156] Jay Banning has served as the RNC's Director of Administration and Chief Financial Officer since 1983, and has been employed by the RNC in these and other capacities for twenty-six years. Banning Decl. ¶ 1.

[157] Senator Alan Simpson served as United States Senator from Wyoming from 1979 to 1997. Simpson Decl. ¶ 2 [DEV 9-Tab 38].

When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign." Simpson Decl. ¶ 6 [DEV 9-Tab 38]. "Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates." *Id.* ¶ 7; *see also* Bumpers Decl. ¶¶ 10-12 [DEV 6-Tab 10]; McCain Decl. ¶ 7 ("[P]arties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' reelection."); Simon[158] Decl. ¶ 10 [DEV 9 Tab 37]; Beckett[159] Decl. ¶ 6 [DEV6-Tab 3];

[158] Senator Paul Simon served as a United States Senator for Illinois from 1985 to 1997, and was a Member of the House of Representatives from 1975 to 1985. Prior to being elected to Congress, Senator Simon served as Lieutenant Governor of Illinois from 1968 to 1972, and served in the Illinois House of Representatives from 1954 to 1962 and in the Illinois State Senate from 1962 to 1966. Simon Decl. ¶ 1 [DEV 9-Tab 37].

[159] Terry S. Beckett is a Democratic political consultant who has spent about 25 years working on political campaigns. Beckett Decl. ¶ 2 [DEV 6-Tab 3]. Beckett worked on the 1976 and 1980 Presidential campaigns of Jimmy Carter, the 1978 Bill Nelson Congressional campaign, and she ran Dick Batchelor's 1982 Congressional campaign. *Id.* Beckett also endeavored to establish a House Democratic Caucus within the Alabama legislature in the mid 1980s. *Id.* Beckett ran Gary Hart's 1988 Presidential campaign in Florida and Louisiana, and Dick Gephardt's 1988 Presidential campaign in Florida. *Id.* In 1986, Beckett did the polling on Linda Chapin's campaign for Orange County (Florida) Commissioner, and ran Chapin's 1990 and 1994 campaigns for Orange County Chairman. *Id.* Beckett also served as general consultant on Ms. Chapin's 2000 campaign to represent Florida's Eighth congressional district, overseeing the work of the campaign manager and the media and polling consultants. *Id.* Beckett has also been involved in government having worked on the Executive Staff for Bob Graham from 1981-82 when he was the Governor of Florida and also serving as Ms. Chapin's Chief of Staff from 1991 to



Bloom[160] Decl. ¶ 3 [DEV 6-Tab 7]; Buttenwieser[161] Decl. ¶ 16 [DEV 6- Tab 11]; ODP0018-00501-02 [DEV 69-Tab 48] (letter from federal candidate regarding "how you can further help my campaign by assisting the Colorado Republican Party"); Shays Decl. ¶ 12 [DEV 68-Tab 40]; Hiatt[162] Dep. at

1994 when she was County Chairman. *Id.* In addition, Beckett worked for a polling firm during the 1980s. *Id.*

[160] Elaine Bloom is currently engaged in consulting, public speaking, and community activities. Bloom Decl. ¶ 2 [DEV 6-Tab 7]. In 2001, Bloom was a candidate for Mayor of Miami Beach, Florida. *Id.* In 2000, Bloom was the Democratic candidate in the general election to represent Florida's 22nd congressional district, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. *Id.* (Shaw won the race by approximately 500 votes out of over 200,000 cast). Prior to the 2000 race, Bloom served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami Beach and Miami). *Id.* Bloom was Speaker Pro-Tempore of the Florida House from 1992 to 1994, and also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. *Id.*

[161] Peter Buttenwieser is a large contributor to the Democratic Party. He estimates that from the 1996 election cycle through the 2002 cycle, he has donated over $2.8 million in nonfederal funds to national committees of the Democratic Party, including over $1.2 million in the 2000 election cycle. Also from the 1996 election cycle through the current cycle, he estimates that he and his wife have contributed approximately $100,000 per cycle in federal funds to federal candidate committees and other federal political committees not affiliated with political parties. During this same period, he has also hosted many hard money fundraising events for federal candidates in Philadelphia. Buttenwieser Decl. ¶ 6 [DEV 6-Tab 11].

[162] Arnold Hiatt engaged in substantial political spending for a number of years. He estimates that from the 1992 election cycle through 1997, he donated approximately $60,000 in federal funds, mostly to federal candidates, with a few contributions to federal political action committees ("PACs"). In October of 1996, he gave a $500,000 nonfederal donation to the DNC. In February of 2001, he made a $5000 hard money donation to

114-16 [JDT Vol. 10] (explaining that anyone donating nonfederal money is indirectly giving it to the campaigns of federal candidates and officeholders); Buttenwieser Decl. ¶ 15 [DEV 6-Tab 11] (explaining that there is little difference between federal and nonfederal money beyond the source and amount limitations on federal money, because national and state political parties use nonfederal money to influence federal elections); Rudman Decl. ¶ 19 [DEV 8-Tab 34].

33. Senator Wirth[163] understood that when he raised funds for the DSCC, donors expected that he would receive the amount of their donations multiplied by a certain number that the DSCC had predetermined, assuming that the DSCC had raised other funds. Wirth Decl. Exhibit A ¶¶ 5, 8 [DEV 9-Tab 43]; *see also Colorado II*, 533 U.S. at 458.

34. In 2000, a Fortune 100 company agreed to contribute $25,000 to the NRSC at the request of George Allen, the then Republican candidate in the 2000 Senatorial race in Virginia against incumbent Senator Chuck Robb. An employee noted that the company had donated to Senator Robb's Leadership PAC and that a similar contribution to the NRSC was necessary to balance out the company's support to the candidates. Internal memorandum (Oct. 26, 2000) [citation sealed].

35. Individual nonfederal money donors have made specific requests that the RNC apply their nonfederal money gifts to particular campaigns. RNC0035464 [DEV99],

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the League of Conservation Voters' PAC, and believes that is the only hard money donation he has given since 1997. Hiatt Decl. ¶ 5 [DEV 6-Tab 18].

[163] Senator Timothy Wirth served in the U.S. House of Representatives from 1974 to 1986, representing the Second Congressional District of the State of Colorado. From 1987 through 1992 he served as Senator for the State of Colorado in the United States Senate. Wirth Decl. Exhibit A ¶ 2 [DEV 9-Tab 43].



RNC0032733-34 [DEV 92] (fundraising letters requesting that soft money donations be used for particular federal elections); *see* Hiatt Dep. at 90-91, 117-18 [JDT Vol. 10] (stating that soft money donations to the DNC are earmarked for particular candidates, but saying he does not know if the money was actually spent on those candidates).

*National Party Use of Nonfederal Money for Federal-Candidate Advocacy*

36. The national parties spend a large proportion of their nonfederal money on so-called "issue advertisements" that are really designed to help elect specific federal candidates. In 2000, for example, the RNC spent a large portion of their nonfederal money, an estimated $70-75 million dollars, on the production and broadcasting of television and radio "issue ads." Oliver[164] Dep. at 148-49 [DEV Supp.-Tab 1]. Of that amount, approximately $14 million were coordinated expenditures, and the rest were so-called "issue ads." *Id.; see also* Marshall[165] Decl. ¶ 3 (largest single portion of DNC budget during 2000 election cycle was used for issue ads) [DEV 8-Tab 28].

37. By the end of the 2000 election cycle, it was clear that parties were using corporate and labor union soft money donations to influence federal elections, often through candidate-specific issue ads, and not primarily for state and local elections. Mann Expert Report at 25-26.

38. The RNC has offered to run these so-called "issue ads" for Members of Congress in their districts, and to have the national committees provide the soft money portion of the funds required to place the ads, if those Members provide the federal portion. *See* ODP0021-01365 to 67 [DEV 70-Tab 48],

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[164] John Oliver is Deputy Chairman of the RNC.

[165] Brad Marshall has served as Chief Financial Officer of the DNC since 1994. Marshall Decl. ¶ 1 [DEV 8-Tab 28].

ODP0025-02936 [DEV 70-Tab 48] (memorandum and email from the RNC offering to pay the soft money portion of political advertisements for Members of Congress who are willing to pay the federal portion).

39. Evidence submitted suggests that during the 2000 election, party ads were not aimed at party building. Almost 92% of party ads never even identified the name of a political party in the body of the advertisement, let alone encouraged voters to register with or support the party or to volunteer with the local party organization. Buying Time 2000 at 64 [DEV 46].

40. Defendants' expert Green states:

> [T]he original exemptions for soft-money were justified partly on the grounds that get-out-the-vote activity would help strengthen parties. As it happened, only a small fraction of the soft money (or hard money, for that matter) that flowed to state and national parties was spent on voter mobilization activity, even broadly conceived to include direct mail and commercial phone banking.' According to the classification system presented by La Raja and Javish Shean (2001, p.3), 8.5% of national party soft money expenditures went to 'mobilization' and 'grassroots.' The figures for state and local parties are each 15%.") (citing Raymond La Raja and Elizabeth Jarvis-Shean, Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections. (Unpublished manuscript: Institute of Governmental Studies and Citizens' Research Foundation 2001).

D. Green Report at 14 n.17 [DEV 1-Tab 3].

41. What has been permitted as "issue advocacy" has not only included genuine issue ads that promote legislation and public policy positions but communications, paid for in whole or part with nonfederal money, that attack or support a



candidate by name without using the "magic words" described in *Buckley*.[166] *See* 144 Cong. Rec. S10071-73 (1999) (Sen. Levin) ("issue ads" indistinguishable from candidate ads which are subject to contribution limits and disclosure requirements); 146 Cong. Rec. H428 (2000) (Rep. Ganske); ODP0021-01365-67 [DEV 70-Tab 48]; ODP0022-00277-88 [DEV 70-Tab 48]; ODP0023- 02358-65 [DEV 70-Tab 48]; ODP0023-03560-660 [DEV 70-Tab 48]; ODP0025-01560 [DEV 70-Tab 48]; ODP0025-02720-21 [DEV 70-Tab 48]; ODP0031-00424 [DEV 71-Tab 48]; ODP0033-00534 [DEV 71-Tab 48]; ODP0036-03603 [DEV 71-Tab 48]; ODP0037-00062 [DEV 71-Tab 48]; ODP0037-00884 [DEV 71-Tab48]; ODP0037-02271 [DEV 71-Tab 48] (examples of advertisements); *see also* Shays Decl. in RNC ¶¶ 7, 8 [DEV 68-Tab 40]; Meehan Decl. in RNC ¶ 13 [DEV 68-Tab 30]; Rudman Decl. ¶ 12 [DEV 8-Tab 34]; Beckett Decl. ¶ 11, Exhibit 3 [DEV 6-Tab 3]; Chapin[167] Decl. ¶ 11 [DEV 6- Tab 12]; Lamson Decl. ¶¶ 9, 17, Exhibits 2-4 [DEV 7-Tab 26];

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[166] *Buckley*, 424 U.S. at 44 n. 52. See description of the difference between "genuine issue ads" and "candidate-centered" advocacy ads in *supra* Parts I.A.3 & I.B.2.

[167] Since early 2001, Linda Chapin has been the Director of the Metropolitan Center for Regional Studies at the University of Central Florida. Chapin Decl. ¶ 2 [DEV 6-Tab 12] received about 49 percent of the votes cast. *Id.* ¶ 4. From 1998 to 2000, Chapin directed the Orange County (Florida) Clerk's Office. *Id.* ¶ 2. Prior to that, Chapin was elected to two successive four-year terms, in 1990 and 1994, as County Chairman of Orange County. *Id.* The County Chairman is a strong executive position roughly equivalent to a mayoral office. *Id.* In recognition of Chapin's work as County Chairman, she received a Public Service Excellence Award from then-President Bill Clinton in 1997, and an Alumni Achievement Award from the Kennedy School of Government at Harvard University in 1999. *Id.* Prior to her tenure as County Chairman, she was elected to a four-year term on the Orange County Commission in 1986.

Pennington[168] Decl. ¶ 13 [DEV 8-Tab 31]; Brock[169] Decl. ¶ 8 [DEV 6-Tab 9]; Williams[170] Cross Exam. at 47 [JDT Vol. 32].

42. Whether or not party ads used so-called "magic words"—and only about 2.3 percent of party spots did in 2000—all 231,000 party spots viewed by coders in the *Buying Time 2000* study were perceived as electioneering in nature—that is, designed to campaign for or against candidates. These ads—96 percent of which mentioned or depicted a candidate—were focused on electing candidates. Buying Time 2000 at 64 [DEV 46].

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[168] Rocky Pennington is a Republican political consultant. Pennington Decl. ¶ 2 [DEV 8-Tab 31]. He is the owner and President of three Florida companies engaged in political activities: Southern Campaign Resources, Direct Mail Systems, Inc., and Summit Communications. *Id.* Southern Campaign Resources, which Pennington founded in 1982, does general consulting primarily for Florida state campaigns, but has also done Congressional races in Florida, including Congressman Cliff Steams' first race in 1988 in Ocala, Bill Sublette's 2000 campaign in the Eighth Congressional district, and Congressman Jeff Miller's 2001 special election in the Panhandle. *Id.* Direct Mail Systems, founded in 1981, is a direct mail company with roughly 100 employees that has done fundraising and has sent voter contact mail for candidates, parties and interest groups in Florida and elsewhere. *Id.* Direct Mail Systems has also sent voter contact mail for some of Florida's Republican congressional delegation, as well as for state Republican parties in many other states. Finally, Summit Communications, which Pennington founded in 2000, creates political advertising for television and radio and buys airtime for various campaigns, such as Congressman Miller's 2001 general election campaign. *Id.*

[169] Senator William Brock he served as United States Representative from Tennessee from 1963 until 1971. From 1971 until 1977, he served as a United States Senator from the State of Tennessee. From 1977 until 1981, he served as Chairman of the Republican National Committee. Brock Decl. ¶ 2 [DEV 6-Tab13].

[170] Pat Williams was a Member of the U.S. Congress from 1979 to 1997. Williams Dep. at 8.



43. Defense expert David Magleby finds that over half, and sometimes as much as three-quarters, of party soft money expenditures go to broadcast advertising. The focus and content of these ads is candidate centered. "The content, tactics and strategy are generally indistinguishable from the candidate campaigns, except that party campaign communications are generally more negative in tone." *Id.* at 45.

44. The RNC's expert Professor La Raja acknowledges that so-called "issue ads" are intended to and do support the campaigns of federal candidates. La Raja Cross, Exhibit 3 at 14, 15, 101, n.11 [JDT Vol. 15]. RNC political operations director Terry Nelson[171] testified that the RNC engages in so-called "issue advocacy in order to achieve one of our primary objectives, which is to get more Republicans elected." Nelson Dep. at 191.

45. Many so-called "issue ads" by political parties were actually electioneering advertisements that focused on the positions, past actions, or general character traits of federal candidates, but not on upcoming federal executive action or pending legislation. *See, e.g.*, ODP0021-01393 [DEV 70-Tab 48]; ODP0023-02288-95 [DEV 70-Tab 48]; ODP0023-02308 [DEV 70-Tab 48]; ODP0023- 02312-13 [DEV 70-Tab 48]; ODP0023-02314 [DEV 70-Tab 48]; ODP0023-02326-28, ODP0025-01729-32 [DEV 70-Tab 48]; ODP0025-01811-12 [DEV 70-Tab 48]; ODP0025- 01861-64 [DEV 70-Tab 48]; ODP0025-02227-28 [DEV 70-Tab 48]; ODP0023-00327-28 [DEV 70-Tab 48]; ODP0023-02389-92 [DEV 70-Tab 48]; ODP0029-00010-25 [DEV 70-Tab 48]; ODP0029-00031-33 [DEV 70-Tab 48]; ODP0029-00041 [DEV 70-Tab 48]; ODP0029-00114 [DEV 70-Tab 48]; ODP0029-00169 [DEV 71-Tab 48]; ODP0029-00177-79 [DEV 71-Tab 48];

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[171] Mr. Terry Nelson is the RNC's Deputy Chief of Staff and Executive Director of Political Operations. Nelson Dep. at 8-9 [JDT Vol. 24].

ODP0029-00235-37 [DEV 71-Tab 48]; ODP0029-00329 [DEV 71-Tab 48]; ODP0029-00339 [DEV 71-Tab 48]; ODP0041-00177-78 [DEV 71-Tab 48]; ODP0041-00202- 06 [DEV 71-Tab 48]; ODP0041-00220-23 [DEV 71-Tab 48]; ODP0041-00280-82 [DEV 71-Tab 48]; ODP0041-00352-54 [DEV 71-Tab 48]; ODP0041-01261 [DEV 71-Tab 48]; ODP0041-01275 [DEV 71-Tab 48]; ODP0029-00138-47 [DEV 71-Tab 48]; ODP0036-01403- 06 [DEV 71-Tab 48]; ODP0036-02931-32 [DEV 71-Tab 48]; ODP0041-00269-71 [DEV 71-Tab 48]; ODP0041-01024-27 [DEV 71-Tab 48]; ODP0041-01219 [DEV 71-Tab 48] (scripts of so-called "issue ads" by political parties).

46. Many so-called "issue ads" by political parties were actually electioneering advertisements that compared the positions, or past actions, of two competing federal candidates, rather than focusing on pending federal legislation. *See, e.g.*, ODP0023-02375-80 [DEV 70-Tab 48]; ODP0023-02387 [DEV 70-Tab 48]; ODP0023-02393-94 [DEV 70-Tab 48]; ODP0029-00149 [DEV 71-Tab 48]; ODP0029-00159 [DEV 71-Tab 48]; ODP0029-00329 [DEV 71-Tab 48]; ODP0036-02984 [DEV 71-Tab 48]; ODP0041-00457-61 [DEV 71-Tab 48]; ODP0041-00585-86 [DEV 71-Tab 48]; ODP0041-00729-32 [DEV 71-Tab 48]; ODP0041-01152 [DEV 71-Tab 48]; ODP0041-01164 [DEV 71-Tab 48]; ODP0041-01177 [DEV 71-Tab 48]; ODP0041-01189 [DEV 71-Tab 48]; ODP0041-01198 [DEV 71-Tab 48]; ODP0041-01266 [DEV 71-Tab 48]; ODP0041- 01337 [DEV 71-Tab 48]; ODP0041-01474-76 [DEV 71-Tab 48]; ODP0041-01479-81 [DEV 71-Tab 48]; ODP0041-01850 [DEV 71-Tab 48]; ODP0041-01854 [DEV 71-Tab 48]; ODP0041-01859 [DEV 71-Tab 48]; ODP0041-01884 [DEV 71-Tab 48] (scripts of political party advertisements).

47. Parties aim their nonfederal money largely at competitive races. The party committees spend millions of soft dollars in competitive U.S. Senate races and hundreds of



thousands of dollars or more in competitive U.S. House races. Magleby Report at 39 [DEV 4-Tab 8]; *see also* Bumpers Decl. ¶ 4 [DEV 6-Tab 10]; McCain Decl. ¶ 22 [DEV 8-Tab 29] ("parties generally focus their soft money spending first on taking care of the parties' current officeholders and on the candidates running for open seats and after that on the challengers running against incumbents"); McConnell Dep. at 237 [JDT Vol. 19] ("I think every Senator realizes that the resources of the [NRSC] are going to be deployed to the ... maximum extent in places where there are competitive races").

48. From late March 1996 through the Republican National Convention, the RNC spent approximately $20 million on advertisements designed to boost Senator Dole's image at a time when he had virtually run out of federal matching primary funds. The RNC paid for a portion of its issue advocacy advertisements with nonfederal funds, including the costs of creating and/or disseminating advertisements that attacked President Clinton's record on welfare reform, taxes, and budgetary policy. Huyck[172] Decl. in *Mariani* ¶¶ 3, 5 [DEV 79-Tab 60]; *see also id.* at Attach. A [DEV Supp.-Tab 9] (text of advertisements paid for by the RNC and other Republican party committees in part with soft money). The RNC conducted a detailed analysis of several advertisements it was planning to run in various markets. The advertisements consisted essentially of two themes: build up Bob Dole and attack Bill Clinton. These advertisements were tested in focus groups to see the effects they had on undecided voters. The advertisement used to build up Bob Dole told his life story and never mentioned the words "vote for," "elect," or any of the so-called "magic words" of express advocacy. The second set of advertisements showed Bill Clinton speaking on a certain issue, then publicly stating

[172] Pat Huyck was the RNC's Director of Accounting as of 1999. Huyck Decl. in *Mariani* ¶¶ 3, 5 [DEV 79-Tab 60].

the opposite. All of the ads were tested to see which would most help Bob Dole and hurt Bill Clinton in the polls. Memorandum to Haley Barbour from Charlie Nave and Joel Mincey, dated May 28, 1996, FEC MUR 4553, Fabrizio Dep., Exhibit 5 [DEV 55-Tab 113]; FEC MUR 4553, Fabrizio Dep. at 83-94 [DEV 55-Tab 113] (despite working as a consultant for Senator Dole, Fabrizio McLaughlin and Associates were sharing their data with the RNC, NRSC, and NRCC).

49. An example of a 1996 RNC "issue ad" is "The Story":

> Audio of Bob Dole: We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.
>
> Voice Over: Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called . . . he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.
>
> Audio of Bob Dole: I went around looking for a miracle that would make me whole again.
>
> Voice Over: The doctors said he'd never walk again. But after 39 months, he proved them wrong.
>
> Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.
>
> Voice Over: Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.
>
> Voice of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Fabrizio Dep. Exhibit 2; McCain Decl. ¶ 15. The RNC paid for "The Story," in part with soft money even though it was



obviously intended to help Bob Dole in the Presidential election. Huyck Decl. in *Mariani* ¶ 3 [DEV 79-Tab 60]; FEC MUR 4553, Fabrizio Dep. at 50 [DEV 55-113]; McCain Decl. ¶ 15 [DEV 8-Tab 29]. The RNC's Curt Anderson and Wes Anderson wrote to the RNC Chairman regarding the Dole "Story" advertisement, stating: "We could run into a real snag with the Dole Story spot. Certainly, all the quantitative and qualitative research strongly suggests that this spot needs to be run. Making this spot pass the issue advocacy test may take some doing." ODP0025-02018-20 [DEV 70-Tab 48]. "Any reasonable person looking at that ad at that particular time in the Presidential season would say: It's not an ad about welfare or wasteful spending; it is an ad about why should we elect that particular nominee." 145 Cong. Rec. S12747 (1999) (Sen. Levin). Senator Dole himself stated that "The Story" "never says I'm running for President. I hope that it's fairly obvious since I'm the only one in the picture." Center for Responsive Politics, A Bag of Tricks: Loopholes in the Campaign Finance System (1996) at 13, ODP0018-00172 [DEV 69-Tab 48]; *see also* McCain Decl. ¶ 15 (citing Attach. D) [DEV 8-Tab 29].

50. During the 1998 election cycle, the NRCC in coordination with the RNC conducted "Operation Breakout," an "issue advocacy" campaign designed to expand the Republican majorities in Congress. ODP0031-00299 [DEV 71-Tab 48] (September 25, 1998, letter from RNC Chair Nicholson to donor thanking him for his donation to "Operation Breakout," describing it as an issue advocacy campaign designed to expand the Republican majorities in Congress); ODP0043-00679 [DEV 71-Tab 48]. *See generally* ODP0043-00673-703 [DEV 71-Tab 48]; ODP0033-00258 [DEV 71-Tab 48]; ODP0041-00176-78 [DEV 71-Tab 48]; ODP0029-00138-49 [DEV 71-Tab 48]; *see also* ODP0030-00002-3 (fundraising letter requesting support for coalition of Republican state and national campaign organizations to

mount the largest issue advocacy campaign in party history) [DEV 71-Tab 48].

51. Television and radio electioneering advertising by political parties played an important role in the 2000 congressional elections in Florida's Eighth and 22nd Districts. Political parties on both sides of these campaigns ran so-called "issue ads" that were financed partly with nonfederal money, but clearly directed at influencing the outcome of the election. In the Eighth District, for example, the DCCC ran television advertising praising Linda Chapin, the Democratic candidate, or criticizing the Republican candidates, through the Democratic State Party in order to take advantage of the more favorable hard money-soft money allocation ratios enjoyed by state parties. Beckett Decl. ¶ 9, Exhibit 1 [DEV 6-Tab 3]; Chapin Decl. ¶ 9 [DEV 6-Tab 12]; *see also* Bloom Decl. ¶ 10, Exhibits 1-1, 1-4, (Democratic party ads in 2000 Florida 22nd congressional district race) [DEV 6-Tab 7]. The NRCC and the Florida Republican Party also ran television ads in the two months prior to the general election, most of which criticized Chapin's record or positions, and which witnesses testify were clearly intended to influence the election results. Chapin Decl. ¶ 10 Exhibit 2 [DEV 6-Tab 12]; Beckett Decl. ¶ 10 Exhibit 2 [DEV 6-Tab 3]; Pennington Decl. ¶ 14 Exhibit 3 [DEV 8-Tab 31]; *see also* Bloom Decl. ¶ 11 Exhibit 2 (Republican party ads in 2000 Florida 22nd district congressional race) [DEV 6-Tab 7].

52. For example, one so-called "issue ad" stated the following:

> Announcer: Linda Chapin. Hard on taxpayers. Soft on convicts. Chapin raised taxes on your utilities, pushed to raise the county sales tax and even tried raising your property tax. Meanwhile, hard time in the county jail turned into "Chapin time." Where convicts received cable tv and lounged on padded furniture in carpeted cells. Chapin's County Commission ran this soft jail . . .



> a jail she called a "national model." Ask Chapin why she's hard on taxpayers and soft on convicts.

Chapin Decl. Exhibit 2; Chapin Decl. ¶ 10; Beckett Decl. ¶ 10; Pennington Decl. ¶ 14.

*The RNC's Involvement in Nonfederal Activities*

53. The RNC also undertakes activities exclusively in connection with state and local elections. RNC General Counsel Josefiak testified that "given the RNC's state-based structure, it is not surprising that the RNC actually focuses many of its resources on purely state and local election activity. This frequently involves significant resources to grassroots activities, some of which exclusively benefit state and local candidates." Josefiak Decl. ¶ 19.

54. Testimony by RNC officials states that for elections in which there is a federal candidate on the ballot, the RNC still funds the training state and local candidates, contributes to state and local candidate campaign committees, and supports get-out-the-vote activities.

55. In 2000 the RNC donated approximately $5.6 million in nonfederal funds to state and local candidates. Josefiak Decl. ¶ 61.

56. The RNC devotes resources to state and local political activities during federal election years even when the federal races are not competitive in a particular state in the hopes of influencing a gubernatorial race (as in California in 2002 and Indiana in 2000). Josefiak Decl. ¶ 62 (testifying that "the RNC sometimes devotes significant resources toward states with competitive gubernatorial races even though the races for federal offices are less competitive"); Peschong[173] Decl. ¶¶ 4, 8-9 (stating that "the RNC typically provides a very substantial share of the funding of state victory programs," which are "programs designed to support the entire

[173] John Peschong is the RNC's Regional Political Director for the Western Region. Peschong Decl. ¶ 1.

Republican ticket, and frequently place more emphasis on high profile state-wide races than on federal races, especially when no federal candidate is running state- wide."). In 2000, according to Josefiak, most observers believed that Indiana was a "safe" state for George Bush and that it also did not have a competitive Senate race. Nevertheless, the RNC "committed significant resources to the state in hopes of influencing the gubernatorial race." Josefiak Decl. ¶ 62.

57. For elections in which there is *no* federal candidate on the ballot, the RNC frequently trains state and local candidates, contributes to state and local candidate campaign committees, funds communications calling for the election or defeat of state and local candidates, and supports get-out-the-vote activities. *See* Banning Decl. ¶ 28(a); Josefiak Decl. ¶¶ 19, 41-59; La Raja Decl. ¶ 14; *cf.* Bok[174] Cross Exam. at 34-35.

58. Five States—Kentucky, Louisiana, Mississippi, New Jersey and Virginia— hold elections for state and local office in odd-numbered years when there are normally no federal candidates on the ballot. *See* Josefiak Decl. ¶ 41. Likewise, numerous cities—including Houston, Indianapolis, Los Angeles, Minneapolis and New York City—hold mayoral elections in odd-numbered years. *See id.;* Erwin[175] Decl. ¶ 5; Green Reb. Decl. App. C at 10 (GOTV study conducted on 2001 elections in Bridgeport, Columbus, Detroit, Minneapolis, St. Paul, and Raleigh).

59. For the 2001 election, an "off-year" election with no federal candidates on the ballot, the RNC spent more than $15.6 million in nonfederal funds on state and local election activity through contributions to state and local candidates, transfers to state parties, and direct spending. *See* Banning

[174] Derek Bok is an expert for plaintiffs.

[175] Ryan Erwin is the Chief Operating Officer of the CRP. Erwin Aff. ¶ 1.



Decl. ¶ 28(a). In the last two off-year elections combined, the RNC spent over $21 million in nonfederal funds to support state and local election activity, not including substantial commitments of staff time and other resources. *Id.* This includes over $9.5 million in direct contributions to state and local candidates, over $10 million dollars to state parties, and over $1 million dollars in direct expenditures. *Id.; see also* Duncan[176] Decl. ¶¶ 14-15 (discussing RNC contributions to state and local races); Josefiak Decl. ¶¶ 19, 41-59 (discussing RNC electoral activity when no federal candidates appear on the ballot); Cross Exam. of Defense Expert Mann at 71 (agreeing that donations gubernatorial candidate in an odd-numbered year is not something that is intended to affect a federal election); La Raja Expert Report ¶ 15. For example, the RNC contributed approximately $500,000 to the Republican gubernatorial candidate in Virginia in 1999. La Raja Decl. ¶ 14(b).

60. Until BCRA's effective date the RNC maintained twelve nonfederal accounts, known as RNSEC accounts. *See* Banning Decl. ¶¶ 6, 17.

61. Because of the variations among state campaign finance laws, the RNC set up different rules to govern each RNSEC account according to the type and amount of contributions that could be deposited therein and the type of disbursements that could be made therefrom. *See id.* ¶ 7.

62. Some RNSEC accounts were reserved for corporate funds, which were used to make contributions or expenditures in states permitting the use of such funds in connection with state and local elections. *See id.* ¶ 8.

[176] Robert Duncan is a Member of the RNC from the State of Kentucky. At the time the RNC's Complaint in this case was filed, he served as Treasurer of the RNC, but as of July 2002 he became its General Counsel. Duncan Decl. ¶ 1.

63. Other RNSEC accounts were reserved for individual funds, which were used to make contributions or expenditures in states not permitting the use of corporate funds in connection with state and local elections. *See id.* ¶ 10.

64. Still other RNSEC accounts held funds raised and spent pursuant to the unique legal requirements of particular states; the RNC set up state-specific RNSEC accounts for California, Massachusetts, Michigan, Missouri, New York, North Carolina, and Rhode Island. *See id.* ¶¶ 11-12, 17.

*The RNC's Involvement in "Mixed" Activities*

65. Prior to the effective date of BCRA the RNC also engaged in "mixed" activities—that is, activities that *indirectly* influence both federal and state or local elections (e.g., administrative overhead, genuine issue ads, non-broadcast party building communications, state redistricting litigation, training for state party officials, and generic voter registration and get-out-the-vote activities). As required by the FEC, the RNC paid for these activities with a combination of federal and nonfederal funds.

66. The FEC historically allowed the RNC to pay for its administrative overhead—including salaries, benefits, equipment, and supplies for party operations at RNC headquarters in Washington, D.C.—with a mix of federal and nonfederal funds. *See* Banning Decl. ¶ 27; *see also* Bowler[177] Decl. ¶ 15.

67. "During the 2000 election cycle, the RNC spent $35.6 million of nonfederal funds and $52.9 million of federal funds on administrative overhead." Banning Decl. ¶ 27. "Administrative overhead includes the operating costs of RNC facilities, such as utility bills and maintenance, fundraising costs, and routine expenses for travel and supplies. Administrative overhead also includes the salaries of RNC

[177] Kathleen Bowler is the Executive Director of the CDP. Bowler Decl. ¶ 1.



employees." *Id.; see also* Bowler Decl. ¶ 15 (stating that allocation is required for administrative expenses like rent, utilities, and salaries).

68. The RNC regularly broadcasts ads for the purpose of influencing an issue or policy. *See, e.g.*, Josefiak Decl. ¶ 91(e); La Raja Decl. ¶ 16(b) ("Political parties use nonfederal money to develop and disseminate political me sages.").

69. According to Josefiak: "The RNC seeks to educate the public about the positions for which the Republican Party stands." Josefiak Decl. ¶ 91(e).

70. According to Josefiak: "The RNC is currently airing a 60-second radio spot entitled 'Leave No Child Behind.' This genuine issue advertisement, which features a man and a woman discussing education issues, states the following:

> Male: Every child can learn . . .
>
> Female: . . . and deserves a quality education in a safe school.
>
> Male: But some people say some children can't learn . . .
>
> Female: . . . so just shuffle them through.
>
> Male: That's not fair.
>
> Female: That's not right.
>
> Male: Things are changing. A new federal law says every child deserves to learn. Female: It says test every child to make sure they're learning and give them extra help if they're not.
>
> Male: Hold schools accountable. Because no child should be in a school that will not teach and will not change.
>
> Female: The law says every child must be taught to read by the 3rd grade. Because reading is a new civil right.
>
> Male: President Bush's No Child Left Behind Law.

Female: The biggest education reform and biggest increase in education funding in 25 years.

Male: Republicans are working for better, safer schools . . .

Female: . . .so no child is left behind.

Male: That's right . . . Republicans.

Anncr: Learn how Republican education reforms can help your children. Call . . . . Help President Bush and leave No Child Behind.

The advertisement mentions President Bush's name for the purpose of identifying the precise proposal supported by the Republican Party ('President Bush's No Child Left Behind Law'), but mentions no federal candidate currently facing reelection. It concludes with a request that listeners call a toll-free number to learn more about Republican education reform." Josefiak Decl. ¶ 91(e); RNC Exhibit 2428. 71. The RNC has used a mix of federal and nonfederal funds to engage in nonbroadcast communications with its supporters. The RNC's magazine "Rising Tide," is designed to provide readers with "a more in-depth education about the Republican issue agenda than is possible in the more traditional 30-second television advertisements." Josefiak Decl. ¶ 99; RNC Exhibit 977. Also, political parties use the internet, e-mail, and direct mail to spread their messages to adherents. *See* La Raja Expert Report ¶ 16(a); Magleby Expert Report at 42.

72. The RNC used a mix of federal and nonfederal funds to support redistricting efforts, including state redistricting litigation. Josefiak Decl. ¶ 74. In 2002, for example, the RNC budgeted approximately $4.1 million on redistricting. Seventy percent of the redistricting budget was to be funded with nonfederal money. Banning Decl. ¶ 28(i). The RNC spends more overall on state legislative redistricting than on congressional redistricting. Josefiak Decl. ¶ 74.

73. The RNC has used a mix of federal and nonfederal funds to conduct training seminars for Republican candidates,



party officials, activists and campaign staff, many of whom are involved in state and local campaigns and elections. Topics included grassroots organizing, fundraising and compliance with campaign finance regulations. During the 2000 election cycle at least 10,000 people attended RNC-sponsored training sessions, including 117 "nuts and bolts" seminars on grassroots organizing and get-out-the-vote activities. During the same cycle the RNC spent $391,000 in nonfederal funds and $671,000 in federal funds on such training and support. *See* Banning Decl. ¶ 28(c); *see also* La Raja Expert Report at 11 (parties "help candidates by training them and their campaign staff," support which "can make an important difference in whether a candidate chooses to run for office, particularly in an era of cash- intensive campaigning that requires skillful application of advanced campaign technologies").

74. The RNC has used a mix of federal and nonfederal funds to support interstate cooperation on state issues among Republican state and local activities. For example, the RNC provided $100,000 of seed money for the formation of a Republican state attorneys general association that focuses on state issues. RNC Exhibit 978; *see also* Josefiak Decl. ¶¶ 82-84. In addition, during the 2000 election cycle the RNC spent $199,000 in nonfederal funds and $33,500 in federal funds on state and local governmental affairs. *See* Banning Decl. ¶ 28(b).

75. The RNC has used a mix of federal and nonfederal funds to support efforts to increase minority involvement and membership in the Republican Party. During the 2000 election cycle, for example, the RNC spent $1,211,000 in nonfederal funds and $2,163,000 in federal funds on support of allied groups and minority outreach. *See id.* ¶ 28(e).

76. Pursuant to FECA and FEC regulations in force prior to BCRA's effective date, the RNC paid for mixed activities using a predetermined "allocation" formula for federal and

nonfederal funds. Josefiak Decl. ¶ 23 ("Since the FEC has long recognized that the RNC is heavily involved in activities at the federal and state levels, the RNC has historically paid for its overhead using an allocation, or 'split,' between federal and nonfederal funds: activities that are purely federal are paid for with 100% federal funds; activities that are purely state or local are paid for with 100% nonfederal funds; and activities that relate to both federal and state elections are paid for with a combination of federal and nonfederal funds.").

77. During presidential election years national party committees were required to pay for their mixed activities with at least 65 percent in federal funds. *See* 11 C.F.R. § 106.5(b)(2)(i) (2001).

78. During nonpresidential election years national party committees were required to pay for their mixed activities with at least 60 percent in federal funds. *See id.* at § 106.5(b)(2)(ii).

*The RNC's Assistance to State and Local Parties for Nonfederal and Mixed Activities*

79. Prior to BCRA's effective date the RNC also provided financial and fundraising assistance to state and local candidates and parties through a variety of means. *See* B. Shea[178] Decl. ¶¶ 32-40; Josefiak Decl. ¶¶ 63-72; Banning Decl. ¶ 28.

80. During the 2000 election cycle the RNC made transfers of approximately $129 million—$93.2 million in nonfederal funds and $35.8 million in federal funds—to state and local parties. *See* Press Release, FEC, National Party Transfers to State/Local Committees: January 1, 1999 to December 31, 2000, *available at* http://www.fec.gov/press/051501 party fund/tables/nat2state.html.

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[178] Beverly Shea is the RNC's Finance Director. Shea Decl. ¶ 1.



81. The RNC helped state and local parties through donor list exchanges; joint fundraising events; promotion of state party fundraising events; facilitating contributions from interested donors; providing matching incentives to encourage state parties to develop their in-house fundraising capabilities through the RNC's "Finance PLUS" program; and devoting personnel to state party fundraising needs. *See* Dendahl[179] Decl. ¶ 10; Duncan Decl. ¶ 13; Josefiak Decl. ¶ 44, 65-72; B. Shea Decl. ¶¶ 32-40; *see also* La Raja Expert Report ¶ 12(b) (discussing national party support for state parties generally).

82. RNC officers have sent fundraising letters on behalf of state and local candidates even during off-years. *See, e.g.*, Josefiak Decl. RNC Exhibit 292 (RNC 0332976) (fundraising letter signed by Deputy RNC Chairman Jack Oliver on behalf of Bret Schundler's New Jersey gubernatorial campaign); Josefiak Decl. RNC Exhibit 1162 (fundraising letter signed by Haley Barbour on behalf of George Allen's Virginia gubernatorial campaign); RNC Exhibit 1766 (fundraising letter signed by Haley Barbour on behalf of New Jersey Republican Party); Feingold Dep. Exhibit 12 [JDT Vol. 6] (fundraising letter from Jim Nicholson on behalf of Norm Coleman's Minneapolis mayoral campaign).

83. RNC officers have been involved in helping state and local parties and candidates raise money in accordance with state and federal law.

84. After becoming Chairman of the RNC in February 2002, Marc Racicot made 82 trips to 67 cities in 36 states in his capacity as Chairman. "The majority of these trips have had significant fundraising components to them." Josefiak Decl. ¶ 70.

85. RNC Co-Chairwoman Ann Wagner and Deputy Chairman Jack Oliver respectively made 31 and 33 trips.

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[179] John Dendahl is the State Chairman of the Republican Party of New Mexico. Dendahl Decl. ¶ 1.

"The majority of these trips have had significant fundraising components to them." *See id.*

86. Robert Duncan, current General Counsel and former Treasurer of the RNC, was actively involved in fundraising activities for the Republican Party of Kentucky and for Kentucky state candidates. Since 1992 when he became a member of the RNC, Duncan has sponsored a reception to support the reelection of a Kentucky state senator and he also hosted and attended numerous fundraising dinners in support of the Kentucky Republican Party. Duncan Decl. ¶¶ 5-6.

87. RNC support has been used by state and local parties to engage in voter registration, get-out-the-vote, and generic grassroots organizing. *See* Banning Decl. ¶ 31.

88. "RNC transfers of non-federal funds to the state parties play a critical role in subsidizing the activities of the state parties. The state parties depend on these funds to pay for everything from their own administrative overhead to voter mobilization, grass roots organizing, and media." Banning Decl. ¶ 31; *see also* Duncan Decl. ¶¶ 11-12.

89. The RNC also helped state and local parties fundraise for these voter mobilization efforts. *See* Josefiak Decl. ¶¶ 63, 65-72; Benson[180] Decl. ¶ 10 ("[T]he Republican national party committees also assists [the Colorado Republican Party] in raising money for these party building programs.").

90. Evidence presented shows that the RNC cooperates and works closely with state and local political parties to support the entire Republican platform and ticket at the federal, state, and local levels.

91. Both sides' experts agree that "relationships among local, state, and national organizations have strengthened in the past three decades" and they attribute the cohesion to "the role of the national parties in providing resources and

[180] Bruce Benson is Chairman of the Colorado Republican Party. Benson Decl. ¶ 1.



expertise to lower levels of the party." La Raja Expert Report at 7 (citations omitted); *see* Mann Expert Report at 30-31 ("The relationship between the national parties and their state parties has never been closer than it is today.").

92. Plaintiff's expert La Raja states that cooperation among national, state, and local parties is generally healthy for American democracy:

> Cohesive parties enhance electoral accountability by linking the campaigns and platforms of federal, state and local candidates. In this way, they provide voters with clear signals about what the party stands for collectively. The joint campaigns of political parties across federal, state and local candidates also generate electoral economies of scale that mobilize greater numbers of voters. The national parties have been catalysts for party integration because they possess the resources to coordinate such activity.

La Raja Rebuttal Report ¶ 9.

93. Examples of national, state, and local political parties working together are the Republican Party "Victory Plans" and the Democratic Party "Coordinated Campaigns." All levels of the Republican party structure actively participate in the design, funding, fundraising and implementation of Victory Plans, *see* Josefiak Decl. ¶¶ 26-40, just as all levels of the Democratic Party participate in the design, funding, fundraising, and implementation of Coordinated Campaigns, *see* Bowler Decl. ¶ 29.

94. The RNC's Victory Plans are voter contact programs designed to support the entire Republican ticket at the federal, state, and local levels. The RNC works with every state party to design, fund, and implement the Plans. *See* Benson Decl. ¶ 8; Josefiak Decl. ¶ 26; Peschong Decl. ¶¶ 4-5.

95. Victory Plans are formulated and implemented after extensive and continuous collaboration between the RNC and the state parties; each Plan is tailored to the unique needs of

each state and designed to stimulate grassroots activism and increase voter turnout in the hopes of benefitting candidates at all levels of the ticket. Josefiak Decl. ¶¶ 25-40.

96. In 2000 the RNC transferred approximately $42 million to state parties to use in Victory Plan programs, 60 percent (about $25 million) of which was nonfederal money and none of which was spent on broadcast "issue advertising." Josefiak Decl. ¶ 31.

97. Although Victory Plans are designed to benefit Republican candidates at the federal, state, and local levels, they often place the greatest emphasis on state and local races because in most instances there are far more state and local candidates than federal candidates on the ballot. *See* Benson Decl. ¶ 8; Bennett[181] Decl. ¶ 17.k (stating that the average ratio of state and local candidates to federal candidates in Ohio in 2002 is 18 to 1). 98. "By their nature, the Victory Plans and the programs specified in them span the calendar year, not just the 60 or 120 days prior to the election." Peschong Decl. ¶ 4.

99. The Victory Plans generally incorporate rallies, direct mail, telephone banks, brochures, state cards, yard signs, bumper stickers, door hangers, and door-to-door volunteer activities. *Id.*

*RNC Fundraising*

100. In 2000 the RNC raised $99,178,295 in nonfederal funds and $152,127,759 in federal funds. *See* Shea Decl. RNC Exhibit 2259.

101. The RNC engages in fundraising through direct marketing—i.e., direct mail, telemarketing and internet solicitations—and through "major donor" programs. In 2000

[181] Robert Bennett has served as Chair of the Ohio Republican Party since 1988. Bennett Decl. ¶¶ 1-2.



the RNC raised $105,860,700 through direct marketing and $146,929,900 through major donor programs. B. Shea Decl. ¶ 7. In 2001 the RNC raised $56,117,600 through direct marketing and $25,909,700 through major donor programs. *See id.*

102. On average, 60 percent of the total amount the RNC raises each year is obtained through direct marketing. *See id.*; Knopp[182] Decl. ¶ 5. Ms. Knopp testifies that she has observed that direct marketing messages that "perform the best are those that emphasize the Republican Party's core political philosophy of lower taxes and less government and the RNC's important role in federal and state elections. In short, the RNC's fundraising success depends on its appeal to persons desiring to associate with its governing philosophy." Knopp Decl. ¶ 25.

103. "Major donors" are defined by the RNC as individuals who give $1,000 or more per year. *See* B. Shea Decl. ¶ 6. In Ms. Shea's experience, like its smaller donors, the RNC's major donors are most responsive to appeals based on the RNC's ideology. *See id.* ¶¶ 23-24. The RNC has six major programs: the President's Club is designed to raise federal contributions of $1,000 per person or $2,000 per couple per year, *see id.* ¶ 14.b; the Chairman's Advisory Board is designed to raise federal or nonfederal contributions of $5,000 per year, *id.* ¶ 14.c.; the Eagles program, the RNC's oldest major donor program, is designed for members who either contribute $15,000 in federal funds or donate $20,000 in nonfederal funds per year, *id.* ¶ 14.d; the Majority Fund is directed at PACs that donate $15,000 in either federal or nonfederal funds per year, *id.* ¶ 14.e; Team 100 is designed for members who donate $100,000 in nonfederal funds upon joining and then donate $25,000 in each of three subsequent

[182] Janice Knopp is the RNC's Deputy Director of Finance/Marketing Director. Knopp Decl. ¶ 1.

years, *id.* ¶ 14.f; and the Regents program is designed for members who give an aggregate amount of $250,000 in nonfederal funds per two-year election cycle, *id* ¶ 14.g. In addition, every four years the RNC establishes a special "Presidential Trust," designed for contributions of $20,000 in federal funds. *See id.* ¶ 15.

104. Over the last nine years the average donation to the RNC, including both federal and nonfederal funds, has been approximately $57. Knopp Decl. ¶ 5; RNC Exhibit 2430.

105. In 2000 the RNC raised the majority of its nonfederal money from individuals—not corporations—and the average corporate donation of nonfederal funds is significantly lower than the average individual donation. In 2000, for example, the average corporate donation on nonfederal funds was $2,226, while the average individual donation of nonfederal funds was $10,410. Knopp Decl. ¶ 9. Knopp further testifies that in the 2000 election cycle the RNC raised $65 million in nonfederal funds from individuals, and $51 million from corporations. *Id.*[183] However, it should be noted that out of the top 50 soft money donors to both parties combined, thirty-five corporations gave 11.4 percent ($29,447,350) of all nonfederal money received by the Republican national committees in the 2000 election cycle. *See* Mann Expert Report at tbl. 6.

*The California Democratic Party ("CDP") and the California Republican Party ("CRP")*

106. The CDP and the CRP each maintain a federal committee registered with the FEC. In turn, the federal committee maintains a federal account, contributions to which comply with FECA's source-and-amount limitations

[183]These figures, including the corporation/individual breakdown, apparently do not include approximately $134 million in donations to Republican national committees aside from the RNC.



and reporting requirements. *See* Bowler Decl. ¶ 9; Morgan[184] Aff. ¶ 3.

107. The CDP and the CRP are each registered as political party committees in accordance with California law. Each maintains a nonfederal account into which contributions permissible under California law are deposited. The parties' nonfederal campaign activities are subject to direct regulation by the California Fair Political Practices Commission and each party regularly files disclosure reports of receipts and expenditures with the Secretary of State. *See* Bowler Decl. ¶ 11; Morgan Aff. ¶ 3.

108. Prior to BCRA's effective date the costs of the CDP's and the CRP's "mixed" activities were "allocated" between each party's federal account and nonfederal account.

109. The CDP was required to allocate funds for administrative expenses such as rent or employee salaries; generic voter identification activities; voter registration activities; get-out-the-vote activities that were not candidate- specific; fundraising expenses; and communications on behalf of both federal and nonfederal candidates. *See* Bowler Decl. ¶ 15.

110. Bowler testifies that the CDP allocated funds in accordance with the FEC's regulations. They allocated funds for administrative expenses, generic voter identification activities, voter registration activities, and get-out- the-vote activities based on a "ballot composition" formula that calculated the ratio of federal offices and nonfederal offices expected to be on the general ballot in a given election cycle. They allocated funds for public communications supporting or opposing federal and nonfederal candidates using a "time-and-space" formula. And they allocated funds for fundraising expenses on a "funds raised" basis. *See id.* ¶ 15.

[184] Timothy Morgan is the Republican National Committeeman from California, elected by the state central committee of the CRP. Morgan Aff. ¶ 1.

*Proposition 34*

111. In November 2000 California voters adopted Proposition 34 to govern campaign contributions in the state. Under Proposition 34, expenditures by political party committees on behalf of state candidates are unlimited. Contributions by political party committees to state candidates are likewise unlimited, although contributions by other contributors other than political parties to state candidates are limited depending upon the elective office. Contributions to state and local political parties for the purpose of making contributions to state candidates are limited to $25,000 per year per contributor. Contributions to state and local political parties for other purposes—e.g., funding administrative and overhead costs, voter registration or generic get-out-the-vote activities or supporting ballot measures or issue advocacy—are unlimited. Contributions to state and local political parties are not source-limited; that is, corporations and labor unions may contribute funds in accordance with generally applicable limits. *See id.* ¶ 11; Erwin Aff. ¶ 5; *see also* CAL. GOV'T CODE § § 85301, 85303(B), 85303(C), 85312.

112. By adopting Proposition 34, California voters approved the statement that "[p]olitical parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions." CDP App. at 1193 ("Proposition 34: Text of Proposed Law").

*The CDP's and CRP's Focus on State and Local Activities*

113. The CDP and CRP focus the majority of their resources on supporting state and local candidates, participating in state and local elections, and influencing state and local policies.

114. In California, state and local races on any particular ballot substantially outnumber federal races, of which there



will be, at most, three in any election cycle. *See* Bowler Decl. ¶ 13; *id.* ¶ 15 (explaining that in the 2002 cycle, where the only Federal office on the California ballots was a congressional race, administrative expenses were required to be allocated 12.5 percent federal and 87.5 percent nonfederal based on the ballot composition formula; in the 2000 cycle which included a Presidential race, administrative expenses were required to be allocated 43 percent federal and 57 percent nonfederal).

115. California holds elections for 120 legislative officers, eight statewide-elected officers and four members of the State Board of Equalization. It holds still more elections for judicial office and local office and ballot measures at both the state and local levels. *See id.* ¶ 13; Erwin Aff. ¶ 5.

116. During the 2002 election cycle—in which, according to CDP Chair Art Torres, there was only one "contested" congressional race "as a practical matter"—the CDP was actively involved in eight statewide nonfederal races and a dozen state legislative races. *See* Torres[185] Decl. ¶ 8.

117. The CDP actively participates in municipal elections. In recent years the CDP has spent several million dollars in nonfederal funds supporting candidates in major cities such as Los Angeles and San Francisco. Torres Decl. ¶ 8.

118. The CDP actively supports and opposes state and local ballot measures. Bowler Decl. ¶ 8.

*CDP & CRP Voter Registration Activities*

119. Evidence shows that the CDP and the CRP conduct voter registration primarily for state and local elections.

120. Erwin testified that "[t]he overwhelming amount of [voter registration] activity is 'generic' voter registration

[185] Art Torres is the elected chair of the CDP. Torres Decl. ¶ 1.

activity urging potential registrants to 'Register Republican.'" Erwin Aff. ¶ 9.

121. CDP and CRP officials testified that "it is often the case that voter registration activities are primarily driven by the desire to affect State and local races." Erwin Aff. ¶ 14a; Bowler Decl. ¶ 20.a.

122. The CDP actively registered over 300,000 Democratic voters throughout California during 2002 even though there was "only one closely contested Congressional race" among the 52 races for the U.S. House of Representatives. *See* Bowler Decl. ¶ 20.a.

123. The CDP's expenditures on voter registration—consisting of a mix of federal and nonfederal funds—were approximately $145,000 in the 1996 election cycle; $300,000 in the 1998 cycle; $100,000 in the 2000 election cycle; and $185,000 during the period from January 1, 2001 to June 30, 2002. *See id.*

124. The CDP's expenditures for voter registration were higher in 1998 (a year with eight statewide elections) than in 2000 (a presidential election year). *Id.*

125. The CRP has paid for voter registration—with a mix of federal and nonfederal funds—through its "Operation Bounty" program in which Republican county central committees, Republican volunteer organizations, and Republican candidates for federal and state office participate. Through Operation Bounty drives, the CRP has typically registered over 350,000 Republican voters in each election cycle since the 1984 cycle (except 1997-98). *See* Erwin Aff. at 13; *see also* CDP App. at 1185 (charting CRP's voter registration activity by election cycle since 1984 cycle).

*CDP and CRP Direct Mail Activities*

126. The CDP and the CRP conduct direct mail campaigns primarily for state and local elections.



127. The CDP typically spends approximately $7 million to $8 million in nonfederal funds on its mail program in support of state and local candidates that does not include federal candidates. *See* Bowler Decl. ¶ 20(b).

128. In 2000, the CDP produced and sent out over 350 different mail pieces for its state and local candidates and ballot measures. These mailings do not reference federal candidates or any federal races. Bowler Decl. ¶ 20(b). This mail often gives both the election date and the person's polling places. *Id.*

129. In most election cycles the CRP mails an absentee ballot application to registered Republican households. In the 1994, 1996, and 1998 cycles the CRP sent between 2.25 and 2.5 million absentee ballot mailers to Republican voters. In the 2000 cycle the CRP sent approximately 5.2 million absentee ballot mailers. Erwin Aff. ¶ 10.b.

*CDP and CRP Get-Out-the-Vote Activities*

130. The CDP conducts get-out-the-vote telephone banks primarily for state and local elections.

131. Approximately 40 to 50 percent of the CDP's paid phone banking is conducted in connection with a specific state or local race and does not make reference to any federal candidate. *See* Bowler Decl. ¶ 20.b.

132. Prior to BCRA's effective date, to the extent the CDP's phone banking referred to both federal and nonfederal candidates, expenditures therefor consisted of a mix of federal and nonfederal funds. *Id.*

133. Prior to BCRA's effective date, to the extent the CDP's phone banking did not endorse any federal candidate, expenditures therefor consisted entirely of nonfederal funds. *Id.*

134. The CDP and the CRP conduct get-out-the-vote door-to-door canvassing campaigns primarily to influence state and local elections.

135. The CDP and the CRP routinely mail slate cards and hand deliver door hangers listing endorsed candidates, urging voters to vote on election day, and informing voters of the date of the election and the polling place. *Id.;* Erwin Aff. ¶ 10.c; Bowler Decl. Exhibit H, Exhibit I.

136. Slate cards and door hangers are usually tailored for a particular local area, and state and local races dominate numerically over federal races. Bowler Decl. ¶ 20.b; Erwin Aff. ¶ 10.c.

137. Prior to BCRA's effective date, to the extent slate cards or door hangers mentioned both federal and nonfederal candidates, expenditures therefore consisted of a mix of federal and nonfederal funds. *See id.;* Bowler Decl. ¶ 20.b.

*State Party "Issue Ads" that Directly Affect Federal Elections*

138. State parties also use nonfederal money to fund federal-candidate centered "issue ads" that are really electioneering advertisements intended to directly affect federal elections.

139. State parties use a large portion of the transferred nonfederal money to finance public communications (principally broadcast and cable advertisements) that support or oppose a federal candidate. *See* Wolfson Decl. ¶ 63; Marshall Decl. ¶ 3 (noting that in 2000, the largest single portion of the DNC budget was used for issue advertising, but that "[t]he DNC typically did not expend money for these issue ads itself, but instead transferred both federal and non-federal money to the state parties to make these expenditures"); Nelson Dep. Tr. at 121, 123. National party "issue advocacy" advertising focusing on electing federal candidates is often bought by state parties, but funded by national party committees, who transfer the funds needed to the state parties. *See, e.g.,* ODP0021-01365-67, ODP0023-02358-65, ODP0023-03560-660, ODP0025-01560, ODP0025-2720-21



[DEV 70-Tab 48] (internal RNC correspondence referencing "issue ads" to berun through state parties).

140. Defense Expert Magleby states that

> Parties can stretch their soft money even further by transferring soft and hard money to state parties where they can achieve a better ratio of soft to hard dollars than if they spent the money themselves. This is because the ratio of soft to hard dollars for party spending if done by the national patty committees is 35 percent soft and 65 percent hard for presidential years, and 40 percent soft and 60 percent hard for off years, but if done by state parties the ratio of soft to hard dollars is greater. The reason for this difference is state parties are allowed to calculate their soft/hard ratio based on the ratio of federal offices to all offices on the ballot in any given year. Both political parties have found spending soft money with its accompanying hard money match through their state parties to work smoothly, for the most part, and state officials readily acknowledge they are simply "pass throughs" to the vendors providing the broadcast ads or direct mail.

Magleby Expert Report at 37 [DEV 4-Tab 8]; *see also* Marshall Decl. ¶ 3 [DEV 8-Tab 28] (testifying that in 2000 the DNC transferred funds to the state parties to take advantage of their allocation rates); ODP0021-1365 to 1367 [DEV 70-Tab 48] (memorandum from Haley Barbour to the California House Republicans, discussing the need to make a media buy in California and stating that "[t]o accomplish this buy, the [RNC] would transfer funds to the California Republican Party, which would actually buy the advertising. Under FEC regulations, the California Republican Party must pay for the advertising with one-third FEC contributions and two thirds nonfederal dollars"); McConnell Dep. at 267-77 [JDT Vol. 19] (stating that the NRSC prefers to transfer funds to state parties who then purchase NRSC advertisements with

a more favorable federal/nonfederal fund allocation ratio); Nelson Dep at 76-77 [JDT Vol. 24] (stating that purchasing political advertisements through state parties has two advantages: (1) better federal/nonfederal fund allocation ratios and (2) "having [a] state disclaimer [on the advertisement] is generally better than having a national disclaimer on it").

141. The national party committees transferred $9,710,166 in federal funds to state party committees during the 1992 election cycle, $9,577,985 during the 1994 election cycle, $49,967,893 during the 1996 election cycle, $30,475,897 during the 1998 election cycle, and $131,016,957 during the 2000 election cycle. The national party committees transferred $18,646,162 in nonfederal funds to state party committees during the 1992 election cycle, $18,442,749 during the 1994 election cycle, $113,738,373 during the 1996 election cycle, $69,031,644 during the 1998 election cycle, and $265,927,677 during the 2000 election cycle. Biersack Decl. tbls. 4, 8 [DEV 6-Tab 6].

142. The RNC transferred federal and nonfederal money to state Republican party committees to pay for electioneering "issue ads." Huyck Decl. in *Mariani* ¶ 4 [DEV 79-Tab 60]; Josefiak Dep. at 97; Hazelwood Dep. at 118-19; *see also* INT810-1605 to 12 (RNC NM0406326—33) [DEV 114] (1998 financial statement for the Republican Party of New Mexico ("RPNM") shows that it received revenues of $1,524,634 in nonfederal transfers from other Republican organizations, $1,110,987 in individual contributions, and just $389,552 in federal transfers from Republican organizations; the RPNM spent over one-third of its 1998 revenues, $1,062,095, on "issue advocacy—television, radio and mail"). In 2000, the RNC raised $254 million, a majority of which was transferred down to the state parties for various activities, including issue advertising. Josefiak Dep. at 76 [JDT Vol. 11]. Most of the transfers are used to pay for issue ads. *See* Vogel Decl. ¶ 63; McGahn Decl. ¶ 55.



143. The DSCC and DCCC support Democratic state political party committees in producing and disseminating electioneering communications, and the large majority of their nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. These communications frequently refer to Democratic Senate or House candidates or their Republican opponents, even though "not expressly advocating any candidate's election or defeat." Wolfson Decl. ¶¶ 63, 71 [DEV 9-Tab 44]; Jordan Decl. ¶¶ 68, 77 [DEV 7-Tab 21]; CDP 02095-101, 2103-04, 2106 [IER Tab 12] (wire transfer instructions from the DNC to the CDP for media buys); CDP 02984-89 [IER Tab 12] (detailing transfer of funds from DCCC to CDP for media buy).

144. When the national parties transfer money to state parties to fund so-called "issue ads," they insist on control of the communications, participate in the creative process, and work with the consultants to determine the content, timing, and placement of the communications. Wolfson Decl. ¶¶ 65-67, 70 [DEV 9-Tab 44]; Jordan Decl. ¶¶ 71-73, 76 [DEV 7-Tab 21]; Vogel Decl. ¶¶ 63, 67-68 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 55, 58-59 [DEV 8-Tab 30]; Castellanos Dep. Tr. (Sept. 27, 2002) at 111-12 (stating that when working on ads for state parties, National Media dealt with an RNC representative, not a state party member); Marshall Decl. ¶ 4 (noting that the DNC normally approved the content of the ad and the amount of money to be spent before calling the state party in question "to let it know that an ad was coming").

145. These so-called "issue ads" are intended to and do support the campaigns of federal candidates. *See* La Raja Cross Exhibit 3 at 15, 101-04; Pennington Decl. ¶¶ 10, 13, 14 [DEV 8-Tab 31]; *see also, e.g.*, CRP 0369, 371, 373 [IER Tab 12] (transcripts of television advertisements paid for with nonfederal money transferred from NRCC to CRP).

146. Certainly, party communications that promote, support, attack, or oppose a clearly identified candidate for federal office directly affect federal elections. *See* McCain Decl. ¶¶ 15-18; Beckett Decl. ¶¶ 8-9 [DEV 6-Tab 3]; Chapin Decl. ¶ ¶ 8-10; Lamson Decl. ¶ 9; Pennington Decl. ¶¶ 10, 13-14; 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

147. Out of the estimated $25.6 million spent by political parties on ads in the 1998 election cycle, $24.6 million went to fund ads that referred to a federal candidate. *See* Krasno & Sorauf Expert Report at tbl. 1. Out of 44,485 ads, 42,599 referred to a federal candidate. *Id.* Viewers perceived 94 percent of these ads as electioneering in nature. *Id.* at tbl. 7.

148. National party committees have directed donors to give nonfederal money to state parties in order to assist the cam-paigns of federal candidates. Kirsch[186] Decl. ¶¶ 6, 9 [DEV 7-Tab 23]; Hassenfeld[187] Decl. ¶¶ 9-10 [DEV 6-

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[186] Mr. Kirsch is founder and Chief Executive Officer of Propel Software Corporation. He has donated millions of dollars to the Democratic Party and to "progressive candidates and groups." Kirsch Decl. ¶ ¶ 2, 4 [DEV 7-Tab 23].

[187] Mr. Hassenfeld has served as Chairman of the Board and Chief Executive Officer of Hasbro, Inc. since 1989, a global company based in Rhode Island with annual revenues in excess of $3 billion. Hasbro designs, manufactures, and markets toys, games, interactive software, puzzles and infant products. He also sits on a number of civic and philanthropic boards. He is a member of the Board of Trustees of the University of Pennsylvania and Deerfield Academy, serves on the Dean's Council of the Kennedy School of Government at Harvard, and sits on the board of Refugees International. He also run three charitable foundations: the Hasbro Charitable Trust, the Hasbro Children's Foundation, and a family foundation. Hassenfeld Decl. ¶¶ 2-3.



Tab 17]; Hickmott[188] Decl. ¶ 8 [DEV 6-Tab 19]; Randlett[189] Decl. ¶ 9 [DEV 8-Tab 32].

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[188] In 1980, during President Carter's re-election campaign, Robert Hickmott worked at the DNC as an Associate Finance Director. Hickmott Decl. ¶ 2 [DEV 6-Tab 19]. Following the general election, Hickmott became the Executive Director of a new DNC entity, the Democratic Business Council ("DBC"), where he served until 1983. *Id.* During 1985-86, Hickmott served as National Finance Director for then-Congressman Timothy Wirth's Senate campaign, and from 1987 until early 1989, on Senator Wirth's Senate staff. *Id.* After that, Hickmott was in private practice as an attorney until January 1991, when he joined the DSCC as Deputy Executive Director. *Id.* In 1993, Hickmott worked for four years as the Associate Administrator for Congressional Affairs at the Unites States Environmental Protection Agency, then for two years as a counselor to then-Secretary Andrew Cuomo at the United States Department of Housing and Urban Development ("HUD"). *Id.* In 1999, Hickmott left HUD and joined The Smith-Free Group ("Smith-Free"), a small governmental affairs firm located in Washington, D.C. *Id.* ¶ 3. Hickmott is currently a Senior Vice President at Smith-Free and one of the six principals in the firm. *Id.* Hickmott is a regular contributor to presidential and congressional candidates and the national party committees. He donates primarily to Democratic candidates, but also to several Republicans. *Id.* In the 1999-2000 cycle, he contributed just over $7,000 and in the 2001-2002 cycle, he has contributed a little more than $10,000. *Id.* Hickmott provided a declaration in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 41 F.Supp.2d 1197 (D.Colo.1999), *aff'd*, 213 F.3d 1221 (10th Cir.2000), *rev'd*, 533 U.S. 431, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) ("Colorado II"); *See Colorado II*, 533 U.S. at 458.

[189] Mr. Randlett is Chief Executive Officer of Dashboard Technology, a World WideWeb technology consulting firm based in San Francisco, California. Prior to founding Dashboard Technology, Mr. Randlett served on the management teams of two other software companies. He was the Democratic political director at the Technology Network, also known as TechNet, a Palo Alto-based nonprofit corporation and political service organization which he co-founded in 1996. Prior to starting TechNet, he spent many years as a political fundraiser and general political consultant, working primarily in the Silicon Valley area of Northern California, but also throughout California and to some extent in major metropolitan areas in other parts of the nation. Randlett Decl. ¶ 2 [Dev 8-Tab 32].

149. Both federal officeholders and the national parties have directed contributors to the state parties when the contributors have "maxed out" to the candidate or when it appears that the state party can most effectively use additional money to help that officeholder or other federal candidates. *See* Kirsch Decl. ¶¶ 8-9; Philp[190] Dep. Tr. at Exhibit 14 [IER Tab 1.F]; CRP 07164 [IER Tab 1.F]; La Raja Cross Exhibit 3 at 54 ("it is common practice for a candidate to encourage donors to give to the party when they have 'maxed' their federal contributions to his or her committee"); Josefiak Decl. ¶ 68; MMc0014 [DEV 117-Tab 2] (letter to a contributor stating "Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000 program .... This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year" signed by Senator McConnell with the handwritten note: "This is important to me. Hope you can help"); Buttenwieser Decl. ¶¶ 15-16 [DEV 6-Tab 11] ("Federal candidates have often asked me to donate to state parties, rather than the joint committees, when they feel that's where they need some extra help in their campaigns. I've given significant amounts to the state parties in South Dakota and North Dakota because all the Senators representing those states are good friends, and I know that it's difficult to raise large sums in those states. The DSCC has also requested that I provide assistance to state parties."); Hassenfeld Decl. ¶ 9 [DEV 6-Tab 17] ("In 1992, when I told the Democratic Party that I wanted to support then-Governor Bill Clinton's presidential campaign, they suggested that I make a $20,000 hard money contribution to the DNC, which I did. The Democratic Party then made clear to me that although there was a limit to how much hard money I could

[190] Alan Philp testified on behalf of the Colorado Republican Party. Philp Dep. at 9 [JDT Vol. 26].



contribute, I could still help with Clinton's presidential campaign by contributing to state Democratic committees. There appeared to be little difference between contributing directly to a candidate and making a donation to the party. Accordingly, at the request of the DNC, I also made donations on my own behalf to state Democratic committees outside of my home state of Rhode Island .... Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign."); [IER Tab 9] (letter from Congressman Wayne Allard, paid for by the Colorado Republican Party, informing contributor that he was "at the limit of what you can directly contribute to my campaign" but at a future breakfast the contributor would be told how he could "further help my campaign by assisting the Colorado Republican Party").

150. While state parties invest much of their nonfederal money transferred to them from the national parties into federal races, La Raja Dep. at 139, they spend the majority of the nonfederal money they raise on administrative overhead, voter registration, voter mobilization, and other party building activities and not on "issue ads." *See* La Raja Decl. ¶ 22.a; Bowler Decl. ¶ 15 (explaining that "[t]he majority of [national transfers] were for issue advocacy, although money has been transferred for voter registration, get-out- the-vote activities, and even administrative expenses. We are able to raise a substantial amount of money for our non-Federal activities and do not rely on national party transfers for those purposes"); Bowler Decl. ¶ 12 (explaining that in the 1999-2000 cycle, the CDP raised $15,617,002 in nonfederal funds, which it used to fund state and local activities); Bowler Rebuttal Decl. ¶ 3-4 (explaining that the CDP pays for much of its voter registration and get-out-the-vote activities with money raised by the state party).

151. The amount of nonfederal money the CRP and CDP raises themselves is much more than the nonfederal funds it receives from transfers from the national party. CDP/CRP 1171 (in 1999-2000, which was a presidential election year, only 19.1 percent of all CRP nonfederal money was from national party transfers); CDP/CRP 35, 37, 39(in 2000 only 36 percent of all CDP nonfederal money was from national party transfers).

*CDP and CRP Cooperation with the National Parties*

152. The CDP and the CRP cooperate and work closely with their national counterparts to support their candidates and platforms at all levels of the ticket.

153. Ms. Bowler testifies that the CDP works closely with the DNC in planning and implementing Coordinated Campaigns, the purpose of which is to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. Party officials, candidates at all levels of the ticket, and their agents participate in Coordinated Campaigns and collectively make decisions regarding the solicitation, receipt, directing, and spending of the CDP's funds, both federal and nonfederal. Bowler Decl. ¶¶ 5, 29. According to Bowler, the CDP is "integrally related to the [DNC]." *Id.* ¶ 5.

154. The CRP works closely with the RNC in planning and implementing a Victory Plan, the purpose of which is to allocate resources and coordinate plans for the benefit of Republican candidates up and down the entire ticket. The Victory Plan is implemented in the general election cycle with the full involvement of RNC staff, CRP staff, state legislative leadership, and representatives from the top of the ticket campaigns. *See* Erwin Aff. ¶ 4.



*Reduction in CDP and CRP Fundraising and Voter Mobilization Efforts*

155. The CDP has always raised more nonfederal money than federal money.

156. The CDP has raised a relatively constant amount of federal money. It raised $4,316,528 in federal funds in the 1996 election cycle; $4,076,870 in federal money in the 1998 cycle; $4,837,967 federal money in the 2000 cycle; and $3,455,887 in federal money during the 2002 election cycle as of June 30, 2002. The funds were raised directly by the CDP; the figures do not include any transfers from other party committees or from candidates. *See* Bowler Decl. ¶ 10, Exhibit A.

157. Ms. Bowler believes that even with increased efforts, it may be difficult for the CDP to raise substantially more federal money than it has in the past. *Id.* ¶ 10.

158. The CDP has tried many methods of raising more federal funds, with little success. Through the telemarketing program, which Bowler states has been its most successful method of raising federal funds, the CDP has raised between $800,000 and $2 million with an average contribution of $27. The telemarketing program, however, is very expensive to run; it costs approximately $0.40 to $0.50 for every dollar raised. *Id.* ¶ 35.

159. Since 1995 the number of contributions made to the CDP at the $5,000 level—the FECA federal maximum—was very small, usually accounting for less than five percent of the CDP's total in federal contributions. The total amount the CDP has received from maximum federal contributions has ranged from $170,000 (in the 2000 election cycle) to $355,000 (in the 1996 cycle). Because the number of contributions at the $5,000 level make up a small percentage of CDP's federal money fundraising, Bowler does not believe BCRA's doubling the limit from $5,000 to $10,000 will result

in a substantial increase in federal funds contributed to the CDP. *See id.* ¶ 35.

160. Prior to BCRA's effective date the CDP raised a relatively constant amount of nonfederal money. It raised $12,991,251 in nonfederal funds in the 1996 election cycle; $15,957,831 in nonfederal money in the 1998 cycle; $15,617,002 in nonfederal money in the 2000 cycle; and $13,928,496 in nonfederal money during the 2002 election cycle up to June 30, 2002. The funds were raised directly by the CDP; the figures do not include any transfers from other party committees or from candidates. *See Id.* ¶ 12, Exhibit A.

161. Approximately 76 percent to 86 percent of the nonfederal donations the CDP has received have been from donations exceeding $10,000. *See id.* ¶ 19, Exhibit A; Torres Decl. ¶ 7.

162. The CRP has employed a wide variety of fundraising techniques to raise more federal money. *See* Erwin Aff. ¶ 12.a.

163. The CRP raises federal funds through direct mail. Erwin states that to maintain a current and effective direct mail fundraising donor list, the CRP must continually spend funds prospecting for new donors and that such prospecting is expensive and often loses money. Federal returns on direct mailings range, on average, from $20 to $40 per contributor and that CRP direct mail returns reached a high in 1986 of over $2 million and have declined to under $1 million since 1997. *Id.;* CDP App. at 1189 (charting CRP's major funding sources by year since 1985).

164. The CRP also uses telemarketing to raise federal funds. Federal returns on the CRP's telemarketing range, on average, from $20 to $40 per contributor. Erwin testifies that like direct mail prospecting, telemarketing prospecting is "expensive and often unproductive." *See* Erwin Aff. ¶ 12.b; CDP App. at 1189. The CRP also relies on "Major Donor



Programs" and "Event Fundraising" for its federal money fundraising. Erwin Aff. ¶ 12.c-d.

165. During the 2000 election cycle, the CRP raised $5,397,400 in nonfederal funds from the 166 donors who gave $10,000 or more. Erwin Aff. ¶ 13(B); Erwin Aff. Chart 5. Those donations totaled $5,397,400. The aggregated amount above $10,000 from those donations accounted for $3,737,400 ($5,397,400 minus $1,660,000 (166 donors multiplied by $10,000)). Erwin Aff. Chart 5, Chart 6A. Thus, if the CRP had been limited in funding certain electoral activities with donations raised within the $10,000 limit specified in the Levin Amendment, $3,737,400 of the $5,397,400 raised from donations above $10,000 would have been unavailable for those purposes. Erwin Chart Aff. Chart 6B. This also means that the CRP would have had 10.5 percent less total revenue to use for Levin- Amendment activities (i.e., $3,737,400 of $35,649,993, the total revenue for the 2000 election cycle, could not have been used for those activities). Erwin Aff. Chart 1.

166. Erwin testifies that BCRA's ban on national party transfers will reduce the CRP's available budget by approximately 40 percent in presidential election cycles and 20 percent in nonpresidential election cycles. Erwin Aff. ¶ 15.a.

167. On average, Erwin attests that between 1993 and 2000 BCRA would have reduced the CRP's overall spending from $30 million to $18 million during presidential election cycles and from $17.5 million to $14 million during nonpresidential election cycles. *Id.*

168. Party officials believe that under BCRA the CDP will have to reduce their communications with voters. Not only will administrative costs have to be reduced, accounting costs will likely increase because of BCRA's additional reporting requirements. Moreover, fundraising costs will increase because only federal money can be used to raise federal or

Levin funds. Thus, even *maintaining* current fundraising efforts will come at a direct cost to the parties' programmatic and candidate-support activities. Because candidate support and get-out-the-vote activities are likely to remain the parties' first priorities, voter registration, generic party-building and grassroots activities will likely be reduced or even eliminated. Bowler Decl. ¶ 23; Torres Decl. ¶ 9.

*Federal Officeholder Solicitation of Nonfederal Money*

169. It is a common practice for Members of Congress to be involved in raising both federal and nonfederal dollars for the national party committees, sometimes at the parties' request. McCain Decl. ¶¶ 2, 21 [DEV 8-Tab 29] ("Soft money is often raised directly by federal candidates and officeholders, and the largest amounts are often raised by the President, Vice President and Congressional party leaders."); Feingold Dep. at 91-93 [JDT Vol. 6]; Shays Decl. ¶ 18 [DEV 8-Tab 35] ("Soft money is raised directly by federal candidates, officeholders, and national political party leaders. National party officials often raise these funds by promising donors access to elected officials. The national parties and national congressional campaign committees also request that Members of Congress make the calls to soft money donors to solicit more funds."); *see also* Rudman Decl. ¶ 12 [DEV 8-Tab 34]; Bumpers Decl. ¶¶ 7-8 [DEV 6-Tab 10]; Simon Decl. ¶ 7 [DEV 9-Tab 37]; Wolfson Decl. ¶¶ 34-35 [DEV 9-Tab 44]; Randlett Decl. ¶¶ 6-9 [DEV 8-Tab 32]; Murray[191] Dep.

[191] Mr. Daniel Murray served as a government relations specialist for Sprint, GTE, and BellSouth Corporations from 1982 until 1995. As Executive Director of those companies, he assisted them and their PACs in selecting candidates and political groups for financial support in both federal and nonfederal funds. During this period he also served on the Democratic Business Council of the DNC, the Advisory Council of the Democratic Leadership Council, the 1998 and 1992 DNC Convention Site Selection Committees, the DSCC Leadership Circle, the DCCC Annual Dinner Committee, the RSCC Annual Dinner Committee, and steering committees for many House and Senate campaigns. Since 1995, he has



in *Mariani* at 41-42 [DEV 79-Tab 58]; Rozen[192] Decl. Exhibit A ¶ 7 [DEV 8-Tab 33]; Simpson Decl. ¶ 4 [DEV 9-Tab 38]; Jordan Decl. ¶¶ 32-33 [DEV 7-Tab 21].

170. Federal officeholders and candidates solicit large nonfederal donations for their parties. ODP0031-00440 (letter from donor to RNC, stating that "I am happy to deliver a check for one hundred thousand dollars to you that fulfills the commitment I made to my good friend Bob Dole in a letter I sent him); ODP0031-00821 (letter from contributor to RNC with contribution, stating "Congressman Scott McInnis deserve [sic] most of the recruitment credit"), ODP0037-00882 (a solicitation letter from Senator McConnell to potential donor at Microsoft Corporation, expressing the hope that this person would "take a leadership role with [McConnell] at the NRSC in support of the Committee's issue advocacy campaign. The resources we raise now will allow us to communicate our strategy through Labor Day .... Your immediate commitment to this project would mean a great deal to the entire Republican Senate and to me personally"); ODP0037-01171-72 [DEV 71-Tab 48] (correspondence referencing solicitations by federal officeholders and candidates); Shays Decl. in RNC ¶ 12 [DEV 68-Tab 40]. In general, the personal involvement of high-ranking leaders of Congress is a

acted as a government relations consultant for business and other clients. Murray Aff. in *Mariani* ¶¶ 3-5 [DEV 79-Tab 59].

[192] Mr. Robert Rozen worked as a lobbyist for various interests at the law firm Wunder, Diefenderfer, Cannon & Thelen from 1995 until 1997. For the last six years, he has been a partner in a lobbying firm called Washington Counsel; now Washington Council Ernst & Young. Mr. Rozen represents a variety of corporate, trade association, non-profit, and individual clients before both Congress and the Executive Branch. His work includes preparing strategic plans, writing lobbying papers, explaining difficult and complex issues to legislative staff, and drafting proposed legislation. He also organizes fundraisers for federal candidates and from time-to-time advises clients on their political contributions. Rozen Decl. ¶ 4 [DEV 8-Tab 33].

significant component of raising federal and nonfederal money from major donors. *See* Bumpers Decl. ¶¶ 8-9 [DEV 6-Tab 10]; Meehan Decl. ¶ 6 [DEV 68-Tab 30]; Simon Decl. ¶ 7 [DEV 9-Tab 37]; Rozen Decl. ¶ 15 [DEV 8-Tab 33]; Kolb Decl. II, Exhibit A ¶ 8 [DEV 7-Tab 25].

171. However, the Finance Director of the RNC stated that it is "exceedingly rare" for the RNC to rely on federal officeholders for personal or telephonic solicitations of major donors. *See* B. Shea Decl. ¶ 17. She states that by RNC policy and practice, the RNC Chairman, Co-Chairwoman, Deputy Chairman, fundraising staff or members of major donor groups—not federal officeholders—undertake initial contact and solicitation of major donors of both federal and nonfederal funds. *Id.*

172. Republican incumbents and candidates solicit donations of federal and nonfederal money for both the NRSC and the NRCC. Vogel Decl. ¶¶ 25-28, 32 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 27-30, 33-37 [DEV 8-Tab 30]; ODP0018-00137 (Victory '96 Brochure outlining the RNC's donor programs and describing the uses of Victory '96 proceeds and Presidential candidate Dole's assistance raising these funds); ODP0018-00139-41, ODP0018-00151-52 [DEV 69-Tab 48] (Victory '96 solicitation letters signed by Senator Dole).

173. "National party committees often feel they need to raise a certain amount of soft money for a given election cycle. To reach that overall goal, they may divide up potential donors by geography, affiliated organization, or issue interests. The party committees decide which Members of Congress should contact these potential donors, and these Members then put in a certain amount of call time at the national committee soliciting the money. A Member and a potential donor may be matched because the Member is on a legislative committee in which the donor has a particular interest, whether economic or ideological." Randlett Decl. ¶ 6



[DEV 8-Tab 32]; *see* Rozen Decl. ¶ 15 [DEV 8-Tab 33]; Krasno and Sorauf Report at 12-13 [DEV 1-Tab 2].

174. The House and Senate congressional campaign committees and their leadership ask Members of Congress to raise funds in specified amounts or to devote specified periods of time to fundraising. Jordan Decl. ¶ 33 [DEV 7-Tab 21]; Vogel Decl. ¶¶ 32-33 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Wolfson Decl. ¶ 35 [DEV 9-44] (stating that the DSCC, NRSC, NRCC, and DCCC ask members of Congress to raise money for the committees).

175. The DSCC maintains a "credit" program that credits nonfederal money raised by a Senator or candidate to that Senator or candidate's state party. Jordan Decl. ¶¶ 36-39 [DEV 7-Tab 21]. Amounts credited to a state party can reflect that the Senator or candidate solicited the donation, or can serve as a donor's sign of tacit support for the state party or the Senate candidate. Jordan Decl. ¶¶ 37-40, Tabs F, G [DEV 7-Tab 21].

176. Both the NRCC and NRSC are aware of which Members have raised funds for their committees, and may advise Members of amounts they have raised. McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Vogel Decl. ¶¶ 33, 36 [DEV 9-Tab 41]. Similarly, although the DCCC uses "no formal credit or tally program," it "advises Democratic House Members of the amounts they have raised for the DCCC, ascribing particular contributions to the fundraising efforts of the Member in question." Wolfson Decl. ¶ 36 [DEV 9-Tab 44]; Thompson Dep. at 28-29 [JDT Vol. 32].

177. Federal candidates of both parties raise nonfederal money through joint fundraising committees formed with national committees. *See* Buttenwieser Decl. ¶¶ 8-14 [DEV 6-Tab 11].

178. One common method of joint fundraising is for a national committee to form a separate joint fundraising

committee with a federal candidate committee. A joint fundraising committee collects and deposits contributions, pays related expenses, allocates proceeds and expenses to the participants, keeps required records, and discloses overall joint fundraising activity to the FEC. Wolfson Decl. ¶ 40 [DEV 9-Tab 44]; Vogel Decl. ¶¶ 39-45 [DEV 9-Tab 41]; Jordan Decl. ¶¶ 41, 50 [DEV 7-Tab 21]; Oliver Dep. at 258 [DEV Supp.-Tab 1]. Similarly, the most common method of NRSC joint fundraising activity is for the NRSC to form a separate joint fundraising committee under FEC regulations with a Republican Senate candidate. Vogel Decl. ¶¶ 39-45.

179. Parties often ask officeholders to solicit soft money from individuals who have maxed out to the officeholder's campaign. Simpson Decl. ¶ 6 [DEV 9-Tab 38]. *See* Bumpers Decl. ¶¶ 9-11 [DEV 6-Tab 10]; Meehan Decl. in RNC ¶ 6 [DEV 68-Tab 30]; Billings Decl. Exhibit A ¶ 12 [DEV 6-Tab 5]; Jordan Decl. ¶ 27 [DEV 7- Tab 21]; Oliver Dep. at 188 [DEV Supp.-Tab 1] (pertaining to 2000 Bush/Cheney legal defense fund); Sorauf/Krasno Report in *Colorado Republican,* at 13-14 [DEV 68-Tab 44]; ODP0018-00620-21 [DEV 69-Tab 48] (federal candidate noting that he "recently sent a letter to [his] maxed out donors suggesting contributions to the NRCC"). The parties prefer that donors first "max out" on federal money gifts before contributing nonfederal money. Kirsch Decl. ¶ 8 [DEV 7-Tab 23]. As one candidate stated, "[Y]ou are at the limit of what you can directly contribute to my campaign," but "you can further help my campaign by assisting the Colorado Republican Party." *FEC v. Colorado Republican Fed. Campaign Comm.,* 533 U.S. 431, 458 (2001) (quoting an August 27, 1996 fundraising letter from then-Congressman Allard).

*Political Parties and Nonprofit Groups*

180. Political parties and federal candidates work with nonprofit groups on campaign activities. Moreover, they have raised nonfederal money for, directed nonfederal money to



and transferred nonfederal money to nonprofits for use in federal elections.

181. The national party committees direct donors to donate nonfederal money to certain interest groups for broadcast issue advertisements and other activities to influence federal elections. For example, Steve Kirsch testified that the national Democratic Party played an important role in his decisions to donate soft money to "certain interest groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential election." Kirsch Decl. ¶ 10 [DEV 7-Tab 23]; *see also* 144 Cong. Rec. S1048 (1998) (Sen. Glenn).

182. Parties raise funds for, or donate nonfederal money to, tax-exempt organizations, which in turn use funds to influence federal elections. Kirsch Decl. ¶ 10 [DEV 7-Tab 23]; Marshall Decl. ¶ 9 [DEV 8-Tab 28].

183. The RNC, NRSC, and NRCC have all made nonfederal donations to the National Right to Life Committee, an independent group that assists Republican candidates through "issue advocacy" activities. Resps. Nat'l Rt. Life Pls. To Defs.' First Interrogs., No. 3 [DEV 10-Tab 5]; RNC0065691A, RNC0065691 [DEV 134-Tab 8, DEV Supp.-Tab 3, DEV 101]. After the NRSC's 1994 donation, then-NRSC Chairman Senator Phil Gramm told The Washington Post that the party made this donation because it knew the funds would be used on behalf of several specific Republican candidates for the Senate, saying he had "made a decision . . . to provide some money to help activate pro-life voters in some key states where they would be pivotal to the election." *Id.* at 5975; *see also* RNC 0373365 [IER Tab 31] (letter from the Republican National State Elections Committee to the American Defense Institute notifying the group of a $300,000 donation from the RNSEC's "non-federal component" to

assist the groups "efforts to educate and inform Americans living overseas of their civic responsibilities"); RNC0373370, 0373376, 0373381 (three letters to Americans for Tax Reform all dated in October 1996 providing the group $1,000,000, $2,000,000, $600,000 donations in recognition of the group's "efforts to educate and inform the American public).

184. The National Right to Work Committee "pays for its advertising from its treasury, [and] admits that certain Members or Executive Branch Officials have generally encouraged financial support for the Right to Work cause and, specifically, for the support of NRTWC in advocating for these issues, through lobbying as well as issue advertising." Resp. Nat'l Rt. Work Comm. to Defs. First RFAs, No. 17 [DEV 12-Tab 2]; *see also* NRW-2812 [DEV 129-Tab 2] (letter from Congressman Pete Sessions asking the recipient to meet with National Right to Work Committee personnel regarding the Committee's effort to "stop Big Labor from seizing control of Congress in November").

185. Congressman Ric Keller signed a Club for Growth fundraising letter dated July 20, 2001 which credited the Club for his own 2000 electoral success and assured potential donors that their money would be used to "help Republicans keep control of Congress." CFG00208-10 [DEV 130-Tab 5]; *see* Pennington Decl. ¶¶ 15, 19 [DEV 8-Tab 31].

186. The 2000 Democratic coordinated campaign in Florida's Eighth Congressional District was funded primarily by EMILY's List through its Florida Women's Vote project, though the DCCC and Congressional candidate Linda Chapin also raised funds for it. Florida Women's Vote gave money to the State Party, which then set up the coordinated campaign and hired the staff. EMILY's List also sent some staff to assist in the coordinated campaign, which they also did in their other targeted races throughout the country. Beckett Decl. ¶ 6 [DEV 6- Tab 3]; Chapin Decl. ¶ 6 [DEV 6-Tab 12].



187. Defendants' expert Green testifies that "[n]ational parties . . . transferred large sums of money to tax-exempt organizations because, unlike state parties, these tax-exempt organizations are not bound by allocation formulas that specify how much hard money must be spent in conjunction with soft money expenditures." Green Expert Report at 17-18 n.17 [DEV 1-Tab 3].

188. Most committees that are organized to support or oppose ballot measures in California are organized as 501(c)(4) committees. Bowler states that virtually all of the ballot measure committees in California engage in activity that can be characterized as get-out-the-vote activity under BCRA. Bowler Decl. ¶ 30.

189. Most Members of Congress either in a formal leadership position, or aspiring thereto, have his or her own 527 group. Public Citizen Congress Watch, Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 6 [DEV 29-Tab 3]. "For congressional leaders, 527 groups appear to collect about as much money as their campaign committees and often as much as their leadership PACs." *Id.* at 9.

190. Most of the 527s active in federal politics exist to either promote certain politicians (which Public Citizen calls "politician 527s") or promote certain ideas, interests and partisan orientations in election campaigns. "Politician 527s generally serve as soft-money arms of 'leadership PACs,' which incumbents use to aid other candidates and otherwise further their own careers. Like the campaign committees of members of Congress, leadership PACs can receive only 'hard money' contributions, which are limited in amounts and may not come directly from corporations or unions. Politician 527s use their soft money mainly to sponsor events that promote their own careers, help create a 'farm team' of successful state and local candidates, and spur partisan 'get-out-the-vote (GOTV)' efforts." *Id.* at 6.

191. Many donors to Member 527 organizations donate with the intent of influencing federal elections. For example, Peter Buttenwieser testified that in early 2002 he donated $50,000 to a 527 organization, Daschle Democrats, which ran broadcast ads in South Dakota supporting Senator Tom Daschle in response to the attacks that had been made against him. Mr. Buttenwieser stated: "I was willing to do this because I felt that the attacks were hurting Senator Daschle and Senator Tim Johnson's re-election campaign as well." Buttenwieser Decl. ¶ 20 [DEV 6-Tab 11].

192. Twenty-seven industries (including individuals, such as executives, associated with the industries) contributed $100,000 or more in just a single year to the top 25 politician 527 groups. These industries accounted for 52 percent of all contributions to the top 25 politician 527s. The top 10 industries contributing were: computers/Internet, securities & investments, lawyers/law firms, telephone utilities, real estate, TV/movies/music, air transport, tobacco, oil & gas, and building materials and equipment. Top corporate contributors included AT&T, SBC Communications, Philip Morris, Mortgagé Insurance Companies of America, Clifford Law Offices, U.S. Tobacco and American Airlines. Overall, only 15 percent of total contributions to the top 25 politician 527's came in amounts of less than $5,000. Democratic party committees and unions also contributed over $100,000 to the top politician 527s. In fact, Democratic party committees (mainly the DNC) were the single largest contributor to politician 527s. Almost all of this money (81 percent) went to the Congressional Black Caucus 527. Public Citizen Congress Watch, Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 10-11 [DEV 29-Tab 3].

193. Section 527 organizations include political clubs. The CDP has contributed to Democratic clubs engaged solely in state-focused grassroots, voter registration, and get-out-the-vote activities. *See id.* ¶ 31. Likewise, most of the organizations participating in the CRP's Operation Bounty Program are Section 527 organizations. Erwin Aff. ¶ 9.



194. Interest groups are funded by persons and entities—whether corporations, unions, trade associations, advocacy groups, or the like—that (1) are intensely concerned about a particular issue or set of issues; (2) participate in the political process; and (3) associate with others of like mind.

195. "Most interest groups, in contrast [to political parties], seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position. In political science, there is strong empirical support for the theory that interest groups allocate resources primarily to pursue the "access" strategy, meaning they give to candidates who are most likely to win office, which is usually the incumbents (see, for example, Herrnson 2000). Political parties, however, allocate resources for electoral strategies, meaning they contribute money to a party candidate who is in a potentially close election." La Raja Expert Report ¶ 14.

196. Interest groups are subject to less regulation than political parties. Unlike political parties, for example, special interest groups have rarely been required to make public disclosure of their receipts, donors, disbursements, and activities. *See* Beinecke[193] Decl. ¶¶ 3, 9 (prior to BCRA, National Resources Defense Council did not have to file disclosure forms with FEC or disclose to the public amounts donated by foundations); Gallagher Decl. ¶ 15 (prior to BCRA National Abortion and Reproductive Rights Action League ("NARAL") was not required to track whether it received donations from persons outside United States);

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[193] Frances Beinecke is the Executive Director of the NRDC. Beinecke Decl. ¶ 1.

Sease[194] Decl. ¶ 11 (Prior to BCRA, Sierra Club was not generally required to report identity of individual donors to any government entity); *see also* Keller Expert Report ¶ 42 (stating that the political activities of interest groups "are far less transparent than those of parties").

*Interest Groups Compared to Political Parties*

197. Interest groups engage in voter registration, voter identification, get- out-the-vote activities, and lobbying of officeholders, Dendahl Decl. ¶ 11, and witnesses predict that under BCRA such activities by interest groups will expand, *see* Bennett Decl. ¶ 11; Benson Decl. ¶ 12; Cross Exam. of Green at 158- 59.

198. Interest groups have increased their grassroots, direct mail, telephone bank, and door-to-door mobilization efforts and they increasingly distribute absentee ballots and provide supporters with transportation to the polls. *See* Peschong Decl. ¶¶ 13-14; Cross Exam. of Green at 21-22.

199. During the closing weeks of the 2000 campaign the NAACP National Voter Fund registered over 200,000 people, put 80 staff in the field, contacted 40,000 people in each target city, promoted a get-out-the-vote hotline, ran three newspaper print ads on issues, made several separate direct mailings, operated telephone banks, and provided grants to affiliated organizations. *See* Cross Exam. of Green at 15-20, Exhibit 3; Cross Exam. of McCain at 70-72. The NAACP reports that the program turned out a million additional black voters and increased turnout (over 1996 numbers) among targeted groups by 22 percent in New York, 50 percent in Florida and 140 percent in Missouri. *See* Cross Exam. of Green Exhibit 3. The NAACP's effort, which cost approximately $10 million, was funded in large part by a single

[194] Deborah Sease is the Legislative Director of the Sierra Club. Sease Decl. ¶ 1.



$7 million donation by an anonymous individual. *See id.* at 20, Exhibit 3; Cross Exam. of McCain at 73-74.

200. NARAL's Executive Vice President, in 2000 NARAL spent $7.5 million and mobilized 2.1 million pro-choice voters. The group also made 3.4 million phone calls and mailed 4.6 million pieces of election mail. *See* Gallagher Decl. ¶ 24.

*The Record Contains No Evidence of Quid Pro Quo Corruption*

201. The record does not include any evidence that nonfederal donations to political parties have resulted in "actual" quid pro quo corruption, such as vote buying.

202. There is no evidence presented in the record that any Member of Congress has ever changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (conceding lack of evidence); McCain Dep. at 171-74 (unable to identify any federal officeholder in quid pro quo corruption); Snowe Dep. at 15-16 (same); Jeffords Dep. at 106-07 (same); Meehan Dep. at 181-83 (same); Shays Dep. at 171 (same); *see also* 148 Cong. Rec. S2099 (daily ed. March 20, 2002) (statement of Sen. Dodd) ("I have never known of a particular Senator whom *[sic]* I thought cast a ballot because of a contribution."); 147 Cong. Rec. S2936 (daily ed. March 27, 2001) (statement of Senator Wellstone) ("I don't know of any individual wrongdoing by any Senator of either party.").

203. Testimony from other former Members of Congress describe, at best, their personal conjecture regarding the impact of soft money donations on the voting practices of their present and former colleagues. *See* Simpson Decl. ¶ 10 ("Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does

not alter the way one thinks about—and quite possibly votes on—an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation."). Senator Simon testifies that

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

Simon Decl. ¶¶ 13-14 [DEV 9-Tab 37]; *see also Colorado II*, 533 U.S. 431, 451 n.12 (2001); Feingold Dep. at 62 [JDT Vol. 6] (testifying that in the fall of 1996 a senior Senator suggested to Senator Feingold that he support the Federal Express amendment because "they just gave us $100,000").



204. To the extent that there is any statistical evidence in the record which would support the conclusion that non-federal donations to political parties or their committees has resulted in actual quid pro quo corruption of federal candidates or officeholders, it has been so seriously called into question that it is of no probative value.

205. Defense expert Green testified that there are no statistically valid studies showing a correlation between political donations (either federal or nonfederal) and legislative voting behavior. *See* Cross Exam. of Green at 58-61. Indeed, Green acknowledged that "[s]ome studies have even found a negative correlation." *Id.* at 54-55; *see also* Cross Exam. of Sorauf at 132 ("political scientists lack the means to observe . . . such things"; Cross Exam. of Bok at 18-21, 35-36 (some existing studies erroneously assume "that because money goes to people who vote a particular way, the money must have caused the vote"). Moreover, Green opines in his expert report that "the literature on the relationship between roll call votes and money is murky because the problem is an extremely difficult one to solve, statistically." Cross Exam. of Green at 67-68. Green further explained in his expert report that the "[c]orrelations between contributions and legislative behavior cannot disentangle whether contributions reward fealty, create it, or merely affect ideological affinity between legislators and their financial backers." Green Expert Report at 24. But Green does note that corruption, whether quid pro quo or otherwise, "redound[s] to the personal benefit of the candidate seeking to win election." *Id.* at 20.

206. To the extent that there is any statistical evidence presented in support of the conclusion that nonfederal donations influence other legislative actions such as committee voting, offering amendments, or filibustering, it is so undermined by challenges to its validity that it has no probative value. *See* Cross Exam. of Green at 55, 68-72, 95 (noting that one study that attempts to find such evidence fails

to take lobbying and other activities into account); Cross Exam. of Primo at 136-38, 142-43 (existing study's findings are mathematically unsupported); Snyder Rebuttal Report at 7-9 (existing study critically flawed). Defendants' expert Mann acknowledges that "[t]here is little statistical evidence that campaign contributions to members of Congress directly affect their roll call decisions: Party, ideology, constituency, mass public opinion and the president correlate much more with voting behavior in Congress than do PAC contributions." Mann Expert Report at 32[DEV 1-Tab 1]; Milkis Expert Report ¶ 41 (political parties reduce the risk of quid pro quo corruption by providing a "protective layer of decision makers between candidates and donors"). However, he notes that "[w]hen these variables are less significant, there is evidence that interest group contributions, particularly to junior members of Congress, have influenced roll call votes - for example, on financial services regulation." *Id.* at 32-33 (citing Thomas Stratmann, Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation. Paper (prepared for delivery at the 2002 Annual Meeting of the American Political Science Association, Boston, 29 August-1 September), *available at* http://apsa proceedings.cup.org/Site/papers/022/022022 StratmannT.pdf. 2002.

*While Some Federal Candidates Are Aware of the Identities of Party Contributors, Others Are Not*

207. Some federal candidates and officeholders are unaware of who donates money to either their campaigns, the parties, or both. *See e.g.*, Feingold Dep. at 115-16 ("Q: How generally are ... Senators made aware of, if at all, the amounts and identities of soft money donors to the national committees? A: I don't know exactly how that's done or how much it's done."); Snowe Dep. at 223-24 (unaware of nonfederal donors to the RNC); Jeffords Dep. at 94-97 (generally unaware of nonfederal donors to RNC and DNC);



Meehan Dep. at 179 (aware of few nonfederal donors to national party committees, and only because "from time to time I read who they are in the newspaper"); *see also, e.g.*, Rudman Dep. at 76 (unaware); Wirth Dep. at 66-67 (unaware); Hickmott Dep. at 66-68 (noting that as Deputy Chief of Staff to former Senator Wirth he was unaware who donated nonfederal funds to national party committees).

208. Others, however, not only acknowledged their own awareness but their belief that other federal officeholders and candidates are typically aware of who donates to their campaigns and to their parties. Indeed, one Member of Congress suggested that he did not know the identity of contributors to his party because he made a conscious effort to remain unaware. Bumpers Decl. ¶¶ 18, 20 (explaining that officeholders of both parties are aware of contributors' identities, and that he had "heard that some Members even keep lists of big donors in their offices" and that "you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party. If someone in Arkansas gave $50,000 to the DNC, for example, I would certainly know that"): Senator Rudman Decl. ¶ 6, Rudman Dep. at 75-78 (explaining that while he did not know the identity of contributors who donated "either hard or soft money" to the RNC, that the RNC "probably" provided him with that information and that "if they came to the office, the [administrative assistant] took them and probably read them." Rudman also explains that sitting Members of Congress are the ones raising nonfederal and federal party donations, and that the party committees decide which donors should contact which members); Congressman Shays, 148 Cong Rec. H352 (2002) (recognizing that "it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect"); Randlett Decl. ¶ 10 ("Information about what soft money donors have given travels among the Members in different ways. Obviously the Member who solicited the

money knows. Members also know who is involved with the various major donor events which they attend, such as retreats, meetings and conference calls. And there is communication among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff."); Wirth Decl. Exhibit A ¶ 17 ("[C] andidates were generally aware of the sources of the funds that enabled the party committee to support their campaigns."); Senator Simpson Decl. ¶ 5 (explaining that "[p]arty leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation .... Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what."); Senator Boren Decl. ¶ 6 (testifying that "[e]ach Senator knows who the biggest donors to the party are" because "[d]onors often prefer to hand their [nonfederal money contribution] checks to the Senator personally, or their lobbyist informs the Senator that a large donation was just made."); McCain Decl. ¶ 6 ("Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money," and "[d] onors or their lobbyists often inform a particular Senator that they have made a large donation."); Vogel Decl. ¶¶ 25-28 (explaining that the parties distribute lists of potential donors to incumbents so that they can solicit donations); McGahn Decl. ¶¶ 21, 34-37 (same); Jordan Decl. ¶¶ 20, 25-28 (same); Wolfson Decl. ¶¶ 21, 28-31 (same); Jordan Decl. ¶¶ 52, 58; Wolfson Decl. ¶ 49; Josefiak Dep. at 117-18; Andrews[195] Decl. ¶ 14; Letter from RNC Chairman

[195] Mr. Wright Andrews is an attorney and lobbyist at the Washington, D.C. firm of Butera & Andrews, specializing in government relations and federal legislative representations. He has been an active lobbyist before Congress since 1975. Prior to that time, he served as Chief Legislative Assistant to then United States Senator Sam Nunn. Prior to forming Butera & Andrews, he worked in the government relations practice at the Washington office of the law firm of Sutherland, Asbill & Brennan. During his career, he has represented clients from throughout the nation and abroad, and they have included major corporations, trade associations, coalitions, and state governmental entities. He has worked with clients on a broad array of issues including environmental matters, federal taxation, banking, financial services, housing, and many others. He has served two terms as President of the American League of Lobbyists, and Washingtonian magazine named him as one of "Washington's Top 50 Lobbyists." Andrews Decl. ¶ 1 [DEV 6-Tab 1].



Jim Nicholson to Donald Fisher, August 18, 1998, (copies to House Speaker Newt Gingrich, House Majority Leader Dick Armey and Congressman John Linder (stating "I appreciate your interest in helping us hold onto our majority in the House .... I can tell you every single dollar of your contribution will go directly into *Operation Breakout* .... If you will make your check out (which can be personal or corporate) to the Republican National Committee and annotate it for *Operation Breakout* I will personally show a copy of it to Newt, Dick Armey and John Linder. Please feel free to accompany it with a transmittal letter containing any other message that you choose."); Senator Feingold Dep. at 115 (explaining that while he does not know how Senators are made aware of the identity of donors of nonfederal money to national parties, it is because he "made a real effort to be far away from that part of the process so [he is] not privy to or aware of exactly how that's done and to what extent it's done."); Congressman Meehan Dep. at 178-79 (explaining that he was unaware of the Democratic National Committee's "tallying" process, by which the amount of money the DNC spends on a particular candidate is related to the amount of nonfederal money that candidate raised for the DNC, however, that he was "probably one of the last people that they would let know about the tallying process"). One

lobbyist, and former DNC official, observed that [W]hen one of my clients is going to make a donation to a federal candidate or party, hard or soft money, I advise them on the manner in which they should do that. I tell them not to just send the check to the party committee, for example, to the young staff member who is collecting the checks. Instead I tell my clients that they should personally give the money to a Member of Congress who then can give the money to the Chair of the party committee, who will in turn make sure that the check reaches the young staff member. That way the donor, with one check, gets "chits" with multiple Members of Congress.

Hickmott Decl. ¶ 9.

*There is No Probative Evidence That National Parties Use Nonfederal Donations to Induce Federal Officeholders to Support or Oppose Legislation*

209. There is no probative evidence that national parties have attempted, through the use of nonfederal donations, to get federal officeholders to change their position on legislation. Senator Rudman testifies that the RNC never asked him to take a particular position because a donor had contributed soft money to the party. Rudman Dep. at 77-82. Senator McCain testifies that "there are many times where the Republican National Committee tried to change my votes and other votes of other Republicans ... [T]he Republican National Committee constantly weighs in on legislation before the Congress of the United States," McCain Dep. at 171-72, but he also states that he does not "know [if it was] in exchange for donations or not").

210. There is no probative evidence in the record which suggests that national party committees support or withhold support from federal officeholders based on their voting records. *See, e.g.*, Vosdingh Dep. at 89 (FEC unaware of any national party committee using nonfederal funds to induce



federal officeholder to support or oppose specific legislation); Mann Cross Exam. at 113-15 ("I would be shocked if [the RNC] ever did such a thing .... [T] he point is to win the margin seat, to control the majority for the party, not to weaken a potentially vulnerable candidate .... It would be self-defeating. That isn't how it works.").

*The Relationship Between Access and Donations*

211. The record contains substantial probative evidence that donors of both federal and nonfederal donations to parties receive greater access, both in the amount of time they spend with federal officeholders and in the priority with which their interests are accorded in comparison to nondonors. *See* Bumpers Decl. ¶ 14; McCain Decl. ¶ 6; Boren Decl. ¶ 9; Senator Glenn (144 Cong. Rec. S1048 (1998); Shays Decl. ¶ 9 (the overall message of the statements of these current and former federal officeholders is that the expectation of the donor is that he or she has access when needed by virtue of his contribution, and that donors often give soft money in response to an invitation for an event that will allow them face-to-face access with a federal officeholder); *see also* Senator Simon Decl. ¶ 16 (stating that he was more likely to first return the telephone call of a donor to his campaign than someone who had not donated, and that increased access for those who give large contributions to the party is not fair to those who cannot afford to give contributions at all).

*The RNC*

212. The RNC's Finance Director Beverly Shea testifies that the RNC does not arrange meetings with government officials for any of its donors—federal or nonfederal—and whenever a donor attempts to condition a donation on obtaining such a meeting, the RNC rejects the donation. *See* B. Shea Decl. ¶ 44. Ms. Shea maintains that the RNC Finance Division, "[a]s a matter of policy," passes along requests

from donors for meetings with a federal officeholder to that officeholder's scheduling staff "without inquiring into the purpose of the proposed meeting"; to "neither to advocate a meeting nor ascertain whether a meeting has been arranged"; to not provide to the officeholder's scheduler the amount of the money that donor has contributed to the party; and to reject any donation that is conditioned on obtaining a meeting with an officeholder. *Id.* at 44, 46. The record, however, includes examples of documents provided by a national party which suggest a link between contributions to the party and the occurrence of meetings with party leadership. *See e.g.*, ODP0025-02456 to 57 [DEV 70-Tab 48] (RNC Chair asking Senate Majority Leader Dole to meet with the "loyal and generous" CEO of Pfizer); RNC0044465 [DEV 93] (RNC employee asking to establish a contact in Senator Dole's office for a "generous" RNC contributor); ODP0030-03512 to 13 [DEV 71-Tab 48] (notes of RNC Chair Jim Nicholson stating he will take up a donor's issue with Senator Trent Lott).

213. Based upon a review of the RNC's donor files, the RNC's Finance Director, Beverly Shea, testifies that during each two-year election cycle the RNC receives no more than 15 requests—most from contributors of *federal* funds—for meetings with Members of the Congress. *See* B. Shea Decl. ¶ 45.

214. Federal candidates and officeholders appear at events held for donors of federal funds as well as for donors of nonfederal funds. *See id.* at 22; *see also* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4-5 (conceding that both federal and nonfederal donors attend political party fundraisers and that all six major national political party committees' fundraisers are open to both types of donors).

*Statistical Evidence Regarding Donations and Access*

215. No valid statistical evidence supports the conclusion that nonfederal donations secure any different access to



federal candidates and officeholders. Experts for the plaintiffs and for the defendants agree that there exists no valid study linking types of donations and "access" or "legislative effort." Cross Exam. of Defense Expert Green at 55, 69-72 (existing studies fail to control for effect of lobbying expenditures and are not "statistically sound"); *id.* at 95 (studies make no effort to "track access specifically"); Krasno & Sorauf Expert Report at 5 ("[T]he absence of systematic data on access . . . prevents political scientists from searching for relationships between access and policy-makers' behavior."); Primo Expert Report at 8-9 (noting only "scant evidence in the political science literature that money secures access" and stating that existing literature is statistically flawed); *see also RNC v. FEC*, Civ. No. 98-CV-1207 (D.D.C.) (Herrnson Dep. at 300 (testifying on behalf of FEC and stating that existing studies on "access" are "kind of weak and wishy washy")).

*Federal Officeholders Are Not More Likely to Meet With Nonfederal Donors Than Federal Donors*

216. The defendants have submitted no probative evidence that federal officeholders are more likely to meet with nonfederal donors than with federal donors. In fact, certain legislators testifying in this case stated that they personally do not provide special access to individuals or corporations that provide large contributions to parties based upon whether the donation was federal or nonfederal. *See* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 4 (conceding lack of evidence); *see also* Feingold Dep. at 116 ("I cannot imagine a situation where . . . I would meet with somebody because they gave soft money."); Snowe Dep. at 210-11 (stating she has never given preferential access to any donor, federal or nonfederal, and that "[e]verybody has access to my office to the extent that I have time available"); Jeffords Dep. at 96-97 (stating person's status as a donor to national party committee does not "affect [his] decisions as to who [he] meet[s] with or give[s] access to"); Meehan Dep. at 180

(stating he provides no preferential access to nonfederal donors); Cross Exam. of Shays at 20-21 (acknowledging that, like most congressman, he "pretty much [has] an open door policy to meet people who want to talk to [him] about important legislative issues").

*Lobbyists, Former Members of Congress, Business Leaders, and Donors Believe that Soft Money Donations to Parties Increase Access to Officeholders*

217. Lobbyist Robert Rozen testifies:

> I know of organizations who believe that to be treated seriously in Washington, and by that I mean to be a player and to have access, you need to give soft money. As a result, many organizations do give soft money. While some soft money is given for ideological purposes, companies and trade associations working on public policy for the most part give to pursue their economic interests. In some cases, that might limit their contributions to one political party. More often, they give to both. They give soft money because they believe that's what helps establish better contacts with Members of Congress and gets doors opened when they want to meet with Members.

Rozen Decl. ¶ 10 [DEV 8-Tab 33]; *see also id.* ¶ 14.

218. Lobbyist Daniel Murray's testimony in a prior case, which has been incorporated into the records of this case, states that "contribution of soft money ... has proven to provide excellent access to federal officials and to candidates for federal elective office. Since the amount of soft money that an individual, corporation or other entity may contribute has no limit, soft money has become the favored method of supplying political support .... [S]oft money begets both access to law-makers and membership in groups which provide ever greater access and opportunity to influence." Murray Aff. in *Mariani* ¶ 14 [DEV 79-Tab 59].



219. Senator Rudman explains: "By and large, the business world, including corporations and unions, gives money to political parties ... [because] they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their views or, worse, that competing business interests who do make large contributions to the party in question will have an advantage in influencing legislation or other government decisions. The same is true in the preponderance of cases where wealthy individuals give $50,000, $100,000, $250,000, or even more to political parties in soft money donations." Rudman Decl. ¶ 5 [DEV 8-Tab 34]; *see also id.* ¶ 6 (stating that sitting members of Congress raise money from these entities knowing that they contribute large sums to the parties in order to achieve such access). Senator Rudman also states that

> [s]pecial interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: 'We gave money so you should do this to help us.' No one needs to say it—it is perfectly understood by all participants in every such meeting."

*Id.* ¶ 7.

220. Chairman Gerald Greenwald[196] testifies that some unions and corporations

> give large soft money contributions to political parties —sometimes to both political parties—because they are afraid to unilaterally disarm. They do not want their competitors alone to enjoy the benefits that come with large soft money donations: namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other governmental action. Labor and business leaders believe—based on experience and with good reason—that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties."

Greenwald Decl. ¶ 12 [DEV 6-Tab 16]; *see also* Greenwald Decl. ¶ 10 [DEV 6-Tab 16.

> "[L]abor and business leaders are regularly advised that—and their experience directly confirms that—organizations that make large soft money donations to political parties in fact do get preferred access to government officials. That access runs the gamut from attendance at events where they have opportunities to present points of view informally to lawmakers to direct, private meetings in an official's office to discuss

[196] Mr. Greenwald is currently Chairman Emeritus of United Airlines, the largest employee majority-owned company in the United States. From 1994 through his retirement in 2000, he served as the Chairman and CEO of United. Prior to that, he was vice chairman at Chrysler Corporation and worked at Ford Motor Company. Greenwald Decl. ¶ 2 [DEV 6-Tab 16]



> pending legislation or a government regulation that affects the company or union.").

221. Individual donor Peter Buttenwieser testifies:

> Events, meetings and briefings held for soft money donors provide opportunities for the donors to hear speeches and engage in policy discussions with federal office holders. There is also a certain amount of politicking and lobbying at these events. This is true particularly in the side discussions, in which donors can approach office holders and discuss their issues.

Buttenwieser Decl. ¶ 25 [DEV 6-Tab 11]. Arnold Hiatt testifies that

> [A]s a result of my $500,000 soft money donation to the DNC, I was offered the chance to attend events with the President, including events at the White House, a number of times. I was offered special access as a result of the contributions I had made, though I generally never took advantage of that access. One event that I did attend was a dinner at the Mayflower Hotel in Washington, D.C. in approximately March 1997 with President Clinton and Vice- President Gore. The dinner was for the largest donors to the DNC, about thirty people. I did not plan on attending but I went because several people urged me to use the occasion to speak in favor of campaign finance reform. I used the opportunity to talk to the President about how the campaign finance system in this country had become a crisis, and argued that the crisis provided an opportunity for the President to provide some leadership. I don't think that we got the leadership I was seeking on the campaign finance issue, but I did get the chance to make a personal pitch to the President as a result of my donation.

Hiatt Decl. ¶ 9[DEV 6-Tab 18]. Hiatt testifies that others in attendance also shared their views on policy matters of importance to them as the event was advertised as an opportunity to "give advice to the president." Hiatt Dep. at

119-21 [JDT Vol. 10]; *see also* Hassenfeld Decl. ¶ 12-13 [DEV 6-Tab 17] ("[W]hen given the opportunity, some donors try to pigeonhole or corner Members, in a less than diplomatic way, to discuss their issues at these events."); Geschke Deel. ¶ 5 [DEV 6-Tab 14] (testifying that in connection with $50,000 in donations made to the DNC he and his wife attended a dinner of 10 to 12 people with President Clinton "last[ing] two or three hours, and consist[ing] primarily of a conversation about issues of importance to the nation and the President's program").

222. Evidence shows that party leaders have in some instances facilitated direct communications between soft money donors and officeholders on certain policy matters. A handwritten note dated October 27, 1995, from RNC Chairman Haley Barbour asks Senate Majority Leader Bob Dole to meet with the CEO of Pfizer, a member of the RNC's "Team 100" soft money donor group, to discuss an extension of the lucrative Section 936 tax credit:

> Dear Bob
>
> Bill Steere, CEO of Pfizer, has asked to see you on Wed. 11/1. He is extremely loyal and generous. He also is not longwinded. He'll tend to his business and not eat up extra time. They have proposed a [Internal Revenue Code § ] 936 solution that [Republican Senator William] Roth and [Republican Congressman Bill] Archer are considering. I'm sure that is the issue. I'd appreciate it if you'd see Bill. [signed] Haley.

ODP0025-02456 to 57 [DEV 70-Tab 48]; *see also* July 10, 1996, letter from John Palmer to [redacted addressee] (reminding addressee that Palmer had asked him to join the RNC's Team 100, and noting that RNC Chair Barbour escorted new Team 100 member and Energy CEO Lupberger on four appointments that were "very significant" in legislation affecting companies like his and made him "a hero in his industry"); ODP0023-02043 [DEV 70-Tab 48];



RNC0240565-RNC0240566 [DEV 97], Sept. 28 [no year] (discussing an upcoming meeting requested by Bristol-Myers Squibb, *in connection with its consideration of joining the RNC's "Season Pass" major donor program;* scheduled attendees included representatives of major pharmaceutical companies and "Active Team 100 members" Bristol-Myers Squibb, Glaxo Wellcome, and Pfizer; the memo stated: "This group is particularly interested in the White House's proposal to add a prescription drug benefit to the Medicare program. They vehemently oppose it and are helping to fund a million-dollar campaign that began in July and features an older woman named Flo, who declares, 'I don't want bureaucrats in my medicine cabinet.'" The memorandum includes as a "Key Talking Point" the directive to "[l]et them know how crucial it is we have their financial support this election cycle"); *see also* Vogel Decl. Tab D at NRSC 066-000009 (draft letter from chairmen of the NRSC and NRCC Technology Committees inviting High Technology CEOs to the 1998 Republican House-Senate Dinner in response "to your industry's plea for a voice on the cutting edge issues so important to the future of high technology" and noting that the dinner is the "most prestigious annual event, and all Republican members of the U.S. House and Senate will be in attendance") [DEV 9-Tab 41]. Former Senator Wirth testifies:

> The Democratic national campaign committees sometimes asked me to meet with large donors to the party whom I had not met before. At the party's request, I met with the donors. I understood that the donors' goal in making the large contributions was often to occasion meeting(s) with me or other prominent Democratic congressional leaders to press their positions on legislative issues. On these occasions, sometimes all I knew about the donor would be the issue in which he was interested. Wirth Decl. Exhibit A ¶ 15 [DEV 9-Tab 43]; RNC0177216 [DEV 95] (note written on stationery of RNC's Team 100 Director, Haley Barbour, stating "they have pretty much decided to join T-100 . . . . They

want access to political players .... Their top issue is tort reform"); RNC0044465 [DEV 93] (Memorandum from Tim Barnes of the RNC to Royal Roth noting that someone from Moore Capital Management had been "trying to establish a contact in Senator Dole's office for Mr. Bacon. As you know, Mr. Bacon [of Moore Capital Management] has been very generous to the RNC. If there is any way you can assist, it would be greatly appreciated.").

*Party Donation Programs Show That Increased Access Corresponds With Larger Donations*

223. RNC documents show that the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors. ODP0018-00113 to 36 [DEV 69-Tab 48] (RNC Brochure "Donor Programs"); *see also* Resps. RNC to FEC's First RFA's, No. 62 [DEV 12-Tab 10]. The RNC offers its donors a range of different donor programs, for a range of different donor financial levels and interests. ODP0025-00375 to 79 [DEV 70-Tab 48] ("Summary of RNC's Donor Programs"). The RNC President's Club required a $1,000 annual contribution and offered at least one meeting per year, which included policy briefings and discussions led by Republican congressional and other leaders. *Id.* at ODP0025-00375. The Chairman's Advisory Board required a $5,000 annual hard money contribution and offered a "vigorous and informal exchange of views among Board members and party leaders .... Board meetings include three or four panel discussions, each chaired by a Congressional leader or senior policy adviser with particular expertise in the area under consideration." *Id.* at ODP0025-00375 to 77 [DEV 70-Tab 48]. According to the document, the Chairman's Advisory Board was established "to enlist the personal energy and professional expertise of Republican leaders in business and community affairs in developing policy and campaign strategies at the highest levels for the



party." *Id.* The Republican Eagles required an annual contribution of $15,000 (individual) or $20,000 (with spouse or corporate). *Id.* at ODP0025-00377-0378, ODP0025-00429 [DEV 70-Tab 48]. The Eagles program offered a series of national and regional meetings with elected Republican congressional leaders, special access to Republican events, and other benefits. ODP0025-00428 [DEV 70-Tab 48]; ODP0030-02838-39 [DEV 71-Tab 48]. The Team 100 program required a donation of $100,000 upon joining and every fourth year thereafter, with $25,000 donations required in each of the three intervening years; ODP0014-00983, ODP0014-01457 to 58 [DEV 69-Tab 48]. The Team 100 program offered members national and regional meetings with the Republican Party leadership throughout the year, special events, membership in the Eagles program, the opportunity to participate in international trade missions, and other benefits. ODP0025-00377, ODP0025-00424, ODP0025-01705 to 13 [DEV 70-Tab 48]. The Season Ticket program required a donation of $250,000 upon joining and renewals thereafter. ODP0022-03045-46, ODP0023-02480, ODP0025-01569 [DEV 70-Tab 48]; ODP0030-03408 [DEV 71-Tab 48]. The "Season Ticket" or "Season Pass" program offered the greatest and most exclusive range of RNC donor program benefits, including one Team 100 membership, two Eagle memberships, special access to a range of Republican Party events, and the assistance of RNC support staff. ODP0025-01569 [DEV 70-Tab 48].

224. The NRSC offered several major donor programs. In 1995 and 1996, the NRSC offered a corporate donor program called "Group 21" or "G21," which required an annual donation of $100,000. ODP0037-02246, ODP0037-02275, ODP0037-02281 [DEV 71-Tab 48]. The "Group 21" program offered donors "small dinners with [then-NRSC Chairman] Senator D'Amato and other senators" and other "VIP benefits." ODP0037-02275 [DEV 71-Tab 48]. The Chairman's Foundation required an annual corporate (meaning

nonfederal funds) donation of $25,000. ODP0036-03603 [DEV 71-Tab 48]. The Senatorial Trust required an annual donation of $10,000 (personal) or $15,000 (corporate). ODP0036-03873-74 [DEV 71-Tab 48]. The Presidential Roundtable required an annual donation of $5,000 in personal or corporate funds. ODP0037-00315 [DEV 71-Tab 48]; *see also* ODP0036-03525 (letter signed by Senator McConnell to NRSC member asking him to renew his membership, noting that "[y]our non-federal contribution to the Chairman's Foundation will allow us to put our federal dollars directly towards the Senate campaigns, where they are desperately needed."); ODP0036-3562 (letter signed by Senator McConnell thanking addressee for joining the Chairman's Foundation); ODP0036-03595 (letter signed by Senator McConnell soliciting someone to join the Chairman's Foundation); ODP0037-01861-69 (NRSC brochure) [DEV 71-Tab 48]; Vogel Decl. ¶¶ 20 ("When donors have reached their federal contribution limit, the NRSC may encourage them to make additional donations to the NRSC's nonfederal account."), 51, Tabs A, J [DEV 9-Tab 41] (2002 Senatorial Trust materials).

225. The NRCC Congressional Forum "has been designed to give its members an intimate setting to develop stronger working relationships with the new Republican Congressional majority," ODP0042-01226 [DEV 71-Tab 48], and the "benefit that attracts most Forum members are the dinners with Committee Chairmen and the Republican members from each Committee." ODO0042-00028 [DEV 71-Tab 48]; *see also* CDP 0098 [DEV 106] (CDP brochure showing that those who contribute $100,000 to the CDP are classified by the party as "Trustees," and that the CDP "recognizes its extraordinary supporters with extraordinary opportunities," and provides "Trustees" with "[e]xclusive briefings, receptions and meetings with officials such as U.S. Senator Dianne Feinstein, U.S. Senator Barbara Boxer, Lt. Governor Gray Davis, Controller Kathleen Connell and other national figures.").



226. The evidence shows that contributors request to be seated with certain lawmakers at these donor events. For example, an RNC "Table Buyer's Guest List" sheet for "The Official 1995 Republican Inaugural Gala" filled out by "Am. Banker's Ass'n/Nation's Bank" contained a request to sit with certain Members of Congress and "anyone on House Banking Comm." ODP0023-3288 [DEV 70-Tab 48]; *see also* 2000 RNC Gala Leadership Levels, undated, RNC0022509 [DEV 92]; 2000 RNC Attendance Forms, April 20, 2000, RNC0236323 [DEV 97] (filled out by Microsoft attendee requesting to be seated with a particular Senator or "Leadership Commerce Comm. or Judiciary"); RNC 0032805-32806, RNC 0032799 [DEV 92] (request for Burger King Chairman and Team 100 member who donated $100,000 to be seated with Senator Fred Thompson and three other Senators, and document showing Senator Thompson was placed at the Burger King table). PhRMA's Judith Bello testified that the five Members of Congress that PhRMA listed as options for the "VIP" to be seated at its table at the 2000 Republican House-Senate dinner were all Members who had responsibility or oversight over issues of importance to the pharmaceutical industry. Bello Dep. at 82 [JDT Vol. 1].

227. The parties appear to have used such opportunities to promote their various donor clubs. For example, a letter from the chairmen of the Congressional Forum of the NRCC sent a letter to the Association of Trial Lawyers of America regarding an upcoming Congressional Forum Chairman's Dinner, in which they wrote: "[o]ur event will give you an excellent opportunity to meet with the Members of the [Judiciary Committee] to discuss issues relevant to your organization." ODP0042-00025 [DEV 71-Tab 48]; *see also* ODP0042-000654 (memorandum to all Congressional Forum members from the chairmen, informing them of an upcoming dinner featuring members of the Banking Committee, noting that "[o]ur event will give you an excellent opportunity to meet with members of the committee to discuss issues

relevant to your organization"); Fowler Decl. ¶ 8 [DEV 6-Tab 13] (testifying that "[p]arty and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities—White House and congressional meetings—to press their views on matters pending before the government."); RNC 0026901 [IER Tab 7] (note from the director of the RNC's Team 100 program thanking a donor for "facilitating Dow [Chemical]'s generous contribution to the Republican Party. It's a timely donation as we head into the final hours of the campaign. Give me a call . . . and we can figure out when is a good time to bring your Dow [Chemical] leadership into town to see [RNC Chairman] Haley [Barbour], [Senate Majority Leader Robert] Dole & [Speaker of the House] Newt [Gingrich]."); RNC 0194817 [IER Tab 1.E] (letter from RNC to a pharmaceutical company asking the company for its opinion and suggestions on the enclosed RNC "health care package" and a $250,000 donation to join the RNC's Season Pass program).

228. According to lobbyist Robert Rozen:

> [S]oft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.



Rozen Decl. ¶ 11 [DEV 8-Tab 33].

229. Some evidence shows the connection between large donations and access to elected officials as being even more direct. A call sheet prepared for then-DNC Chair Fowler instructs him to call a number of large givers ask for donations, and invite them for lunch with the President of the United States ("POTUS"). DNC 113-00137 to 38 [DEV 134-Tab 7] ("Ask her to give 80k more this year for lunch with Potus on October 27th.") ("Ask him to write another 100K to become a Managing Trustee for the campaign and come to lunch with POTUS on Oct. 27."). A CDP call sheet entitled "Child Call List, 5/16/96" includes the notation that a potential donor should be asked "if they might be able to do $25,000 for a small mtg with the President, you know it's steep, but want to include them in these types of meetings." CDP 00124 [IER Tab 11].

*Donors Make Donations to National Parties With the Expectation of Building Relationships and Receiving Access*

*Lobbyists Believe That Donations Will Enable Donors to Establish Relationships With Officeholders*

230. Lobbyist Robert Hickmott testifies that he advises his clients to make contributions in order to "establish relationships. Having those relationships in many ways then helps us get meetings and continue that relationship." Hickmott Dep. at 50 [JDT Vol. 10]. Hickmott testifies that when Senator Robb was chairman of the DSCC he would go to the DSCC offices where he would "accept checks from individuals or organizations who wanted to give money to the DSCC and they wanted face time with Chairman Chuck Robb." *Id.* at 94-95. Donors would "use this as an opportunity not only to make a contribution to the DSCC, but also to convey to Senator Robb what their group or individual

position was on an issue." *Id.* at 95; *see also* Hickmott Decl. Exhibit A. ¶ 46 (stating that "[t]here is a very rare strata of contributors who contribute large amounts to the DSCC because they actually believe in Democratic politics . . . . The majority of those who contribute to political parties do so for business reasons, to gain access to influential Members of Congress and to get to know new Members.").

231. As Wright Andrews explains:

> Sophisticated political donors—particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups—are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

Andrews Decl. ¶ 8 [DEV 6-Tab 1].

232. Some lobbyists believe that donations to parties are beneficial to their clients' business interests. *See* Rozen Decl. ¶ 10 ("[L]arge political contributions are worthwhile because of the potential benefit to the company's bottom line.") [DEV 8-Tab 33].

*Current and Former Federal Officeholders Acknowledge That Donors Expect to Establish Relationships With and Obtain Access to Federal Officeholders*



233. Some former and current federal officeholders acknowledge that donors expect to establish relationships with officeholders in return for their nonfederal donations to the national parties. Senator Bumpers Decl. ¶ 13 (testifying that people that give money to party committees feel that they are "ingratiating themselves" with the federal officeholder who solicits the donation); Wirth Decl. Exhibit A. ¶ 5 (stating that those donors who made contributions to the state party "almost always did so because they expected that the contributions would support my campaign," and that, generally, "they expected that [the Senator] would remember their contributions"); Brock Decl. ¶ 5(a) (testifying that "contributors . . . feel they have a 'call' on . . . officials" when they contribute soft money); Senator Boren Decl. ¶ 8 (testifying that he knows from "first hand experience and from [his] interactions with other Senators that they feel beholden to large donors."); Senator Simpson testifies that groups used "to give to someone who was for your philosophy," but now "[i]t's giving so you can get access and kiss butt and do all the rest of the things so you won't get knocked off the perch." Simpson Dep. at 11-12 [JDT Vol. 30].

*Donors Hope to Establish Relationships or Receive Access With Their Donations*

234. Steven Kirsch testifies that:

> Policy discussion with federal officials occurs at major donor events sponsored by political parties. I have attended many such events. They typically involve speeches, question and answer sessions, and group policy discussions, but there is also time to talk to Members individually about substantive issues. For example, at a recent event. I was able to speak with a Senator representing a state other than California and we had a short conversation about how our respective staffers were working together on a particular issue.

Kirsch Decl. ¶ 12 [DEV 7-23]; *see also* Hiatt Decl. ¶ 11 (stating that "[l] arge soft money donors give in order to obtain access and influence."). In fact, corporate donors view nonfederal donations as the "cost of doing business." Hassenfeld Decl. ¶ 16 (testifying that nonfederal donations are viewed by the "corporate world" as "a good investment relative to the potential economic benefit to their business."); Hassenfeld Decl. ¶¶ 23-24 ("I think companies in some industries have reason to believe that because their activities are so closely linked with federal government actions, they must participate in the soft money system in order to succeed.") [DEV 6-Tab 17]; Randlett Decl. ¶ 5 (stating that "many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction. Some soft money donors give $250,000, $500,000, or more, year after year, in order to achieve these goals. For most institutional donors, if you're going to put that much money in, you need to see a return, just as though you were investing in a corporation or some other economic venture."); Randlett Decl. ¶ 14 (explaining that "many members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game. They are caught in an arms race that is accelerating, but that many feel they cannot afford to leave or speak out against."); Kirsch Decl. ¶ 14 (stating that "[major] donors perceive that they are getting a business benefit through their special access, and that it is a good investment for them") [DEV 7-Tab 23].

235. Roger Tamraz, an American businessman involved in investment banking and international energy projects, made donations to the DNC during the 1996 election cycle. When asked during congressional hearings by Senator Levin whether one of the reasons he made the contributions was because he "believed it might get [him] access?," Mr. Tamraz



responded: "Senator, I'm going even farther. It's the only reason-to get access . . . . " Thompson Comm. Report at 2913 n.46 (quoting page 63 of Mr. Tamraz's testimony before the committee).

236. Donor Peter Buttenwieser, a large donor to Democratic party committees, testified that

> [t]here is no question that those who, like me, make large soft money donations receive special access to powerful federal office holders on the basis of the donations. I am close to a number of Senators, I see them on a very consistent basis, and I now regard the Majority Leader as a close friend. I understand that the unusual access I have correlates to the millions of dollars I have given to political party committees, and I do not delude myself into thinking otherwise. Not many people can give soft money on that scale, and it naturally limits the number of those with that level of access.

Buttenwieser Decl. ¶ 22.

237. An Eli Lilly and Company memorandum states that its 1995-96 political "contributions and the related activities we have participated in have been key to our increased role and ability to get our views heard by the right policy makers on a timely basis; in other words, a smart investment." Eli Lilly and Company Memorandum (Jan. 15, 1997), ODP0018-00481-86 [DEV 69-Tab 48].

238. Documents submitted indicate that a Fortune 100 company contributes nonfederal money to national party committees with the expectation that its contributions will cultivate or strengthen its "relationships" with particular Members of Congress. *See* internal Fortune 100 company memorandum titled "Senator Earnest Hollings/South Carolina Democratic Party" (June 29, 2000) [citation sealed] (requesting a "check for $10,000.00 on behalf of Senator Ernest 'Fritz' Hollings to the South Carolina Democratic Party," noting that "Senator Hollings has been a friend to [our

company] for many years and he has shown himself to be a thoughtful voice regarding issues in our industry," that "[h]e currently serves on the Commerce, Science and Transportation Committee, the Budget Committee and the Appropriations Committee," and concluding "I feel this would be a great opportunity to strengthen our relationship with Senator Hollings."). An internal Fortune 100 company memorandum entitled "Justification for donation to [DSCC]" (October 25, 2000) [citation sealed], stated

> I am requesting a check for $50,000.00 to the Democratic Senatorial Campaign Committee (DSCC). Senator Robert Torricelli is the chairman for the DSCC and in a recent conversation with the Senator, he requested the above amount from [our company]. Senator Torricelli has been a friend to [our company] for many years and he has shown himself to be a thoughtful voice regarding issues in our industry. He currently serves on the Judiciary, Foreign Relations & Governmental Affairs and Rules and Administration Committees. I feel this would be a great opportunity to strengthen our relationship with Senator Torricelli and the DSCC.

One legislative advocate from this company described the benefits reaped from contributing $100,000 to the NRCC: "I think we established some goodwill with [Congressman] Tauzin, both by [our company] contributing at the $100,000 level to the NRCC dinner he chaired last month and by my participation in the NRCC Finance Committee for the dinner. Tauzin understood that [our company] participated at the same level as [others in our industry] did, and he expressed genuine interest in trying to begin to reach out to the competitive industry. In sum, I think the event was a real positive for [our company]." Internal Fortune 100 company memorandum entitled "NRCC Leadership Winner 2000," dated April 4, 2000, [citation sealed].



*Effectiveness of Giving Nonfederal Donations as Opposed to Federal Donations*

239. Some donors give nonfederal money, rather than federal money to parties or direct contributions to a candidate's campaign, because they believe nonfederal money is more effective than several small contributions in obtaining access. *See, e.g.*, Hickmott Decl. Exhibit A. ¶ 47 (explaining that "[i]f you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at the various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates."); Wright Andrews, a lobbyist, stated that

> a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC. Although the donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely to remember the donation and to recognize that such big donors' interests merit careful consideration.

Andrews Decl. ¶ 14; Randlett Decl. ¶ 13 [DEV 8-Tab 32] ("[Soft money donors] get a level of attention that a $1,000 hard money donor never will. Even someone who wrote 25 $1,000 hard money checks but no soft money is going to get

much less attention and appreciation than someone who wrote one large soft money check."). Rozen, a lobbyist, stated that

> Donors to the national parties understand that if a federal officeholder is raising soft money—supposedly 'non-federal' money—they are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving $100,000, $200,000, even $1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed . . . . The bigger soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.

Rozen Decl. ¶¶ 12-13 [DEV 8-Tab 33]; Geschke[197] Decl. ¶ 9 [DEV 6-Tab 14] ("Corporations and individuals can use soft money donations to get special access to federal office holders and at least the appearance of influence on issues that are important to them financially or politically. Hard money contributions do not provide the same opportunities for influence on federal policy as soft money donations do."); Fowler[198] Decl. ¶ 6 [DEV 6-Tab 13] ("Many contributors of large sums of money—both Republicans and Democrats—

[197] Mr. Charles Geschke is Chairman of the Board of Adobe Systems, Inc., which he co-founded in 1982. Geschke Decl. ¶ 1 [DEV 6-Tab 14]. Since 1994, Mr. Geschke estimates that he has donated over $150,000 in federal funds to federal political committees, and over $18,000 in nonfederal funds to national party committees. *Id.* ¶ 3.

[198] Mr. Donald Fowler from 1971 until 1980, he served as Chairman of the South Carolina Democratic Party and from January 1995 until January 1997 he served as Chairman of the Democratic National Committee. Fowler Decl. ¶ 2 [DEV 6-Tab 13].



gain access to party and governmental officials that they otherwise would not have. With this access, contributors are able to make their cases to people who make public policy and take official governmental action. Those who contribute small amounts of money do not have this advantage and thus are unable to influence government with the same effectiveness.").

240. In a memorandum to a high-level Fortune 100 company executive outlining a proposed $1.4 million nonfederal fund budget for FY1999, members of the Company's governmental affairs staff noted that

> With both houses of Congress and the White House hotly contested this cycle, the importance of soft money, and consequently the efforts by the parties to raise even more soft money, is greater than ever. On the Democratic side, [our company's] advocates have already fielded soft money calls from House Democratic Leader Gephardt, House Democratic Caucus Chairman Frost, Democratic Congressional Campaign Chairman Kennedy, and Democratic Senatorial Campaign Chairman Torricelli. Similar contacts to soft money have been made by Republican congressional leaders. In addition to the increased pressure from party and congressional leaders, it is clear that our direct competitors and potential competitors are weighing in with big soft money donations.

Memorandum from a Fortune 100 company's legislative advocate to a high-level executive, dated March 4, 1999, [citation sealed].

*Donors Often Times Give to Both National Parties in Order to Receive Access to Members of Both Parties*

241. Evidence presented shows that many "companies and associations that do give soft money typically contribute to both parties . . . because they want access to Members on

both sides of the aisle." Rozen Decl. ¶ 7 [DEV 8-Tab 33]; *see also* Hiatt Decl. ¶ 12 [DEV 6-Tab 18] (testifying "[p]eople give soft money donations to both parties because they want to make sure they have access regardless of who's in the White House, filling the Senate seat, or representing the Congressional district."); RNC OH 0418778 [IER Tab 1.H] (an Ohio Republican Party document entitled "Why People Give," including the observation: "many people give to both sides so that they will have access to whoever is the winner").

242. An Eli Lilly and Company memorandum indicates the company was worried about a *Washington Post* article listing it as a significant donor to the Republican party. The memorandum discusses contributions being made at Democratic party events occurring in the near future. The memorandum concludes with: "Jay has talked to the White House and we can get back into this by giving $50-100,000 to the DNC—says they would be pleased with this." ODP0018-00463 [DEV 69-Tab 48]; *see also id.* at ODP0018-00461 (the *Washington Post* article), ODP0018-00462 (photocopy of part of the article with handwritten note stating "Dems are upset. Calls from employees about imbalance. White House says Dem we are in trouble").

243. CEO Randlett comments that "[a]s a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective." Randlett Decl. ¶ 11 [DEV 8-Tab 32]. He explains

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or friendly lobbyist call and indicate that someone with interests before a certain committee has had their



> contributions to the other side noticed. They'll get a message that basically asks: "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

*Id.* ¶ 12. *See also* Buttenwieser Decl ¶ 23 [DEV 6-Tab 11] ("I am aware that some soft money donors, such as some corporations, give substantial amounts to both major political parties. Based on my observations, they typically do this because they have a business agenda and they want to hedge their bets, to ensure they get access to office holders on the issues that are important to them. This occurs at the national and state levels."); Geschke Decl. ¶ 10 [DEV 6-Tab 14] ("In my view, donors who give large amounts of soft money to both major parties are probably hedging their bets in trying to get influence. They may feel that influence with one party is not sufficient to achieve their financial or policy goals, especially now that power in Congress is pretty evenly balanced.").

*Lobbying and Donations of Nonfederal Money*

244. According to some national party officials and former Members of Congress, lobbying is more effective in

obtaining access to legislators than donations to campaigns and parties.

245. According to the RNC Finance Director, lobbying is far more effective in securing "access" to federal officeholders than donating campaign funds. *See* B. Shea Decl. ¶ 45 ("It is obvious why major donors to the RNC do not regularly use their donations as a means to obtain 'access.' All or virtually all who have personal or organizational business with the federal government retain or employ professional lobbyists."); *see also* Primo Cross Exam. at 164.

246. As Former Senator Bumpers (who testified on behalf of the defendants in this case) has testified previously, lobbying expenditures are more likely to obtain nonincidental contact with a federal officeholder than are campaign donations. *See RNC v. FEC*, Civ. No. 98-CV-1207 (D.D.C.); Bumpers Dep. at 38-40.

247. Many entities and individuals who donate federal funds to political parties also spend considerable sums of money lobbying federal officeholders. Indeed, the amount of money spent by such organizations on lobbying is often geometrically larger than the amount they donate to political parties. *See* Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24 (admitting that top five corporate donors of nonfederal funds during 1995 and 1996 donated $9,009,155 to national party committees and same five corporations spent $27,107,688 on lobbying during 1996 along); *see id.* at 24-25 (admitting that top five corporate donors of nonfederal funds during 1997 and 1998 donated $7,774,020 to national party committees and same five corporations spent $42,000,000 on lobbying during that same period).

248. Some of the lobbyists who testified in depositions and on cross examination state that their corporate clients hire



them in large part because of their contacts on Capitol Hill and because they have access to federal officeholders whether or not their clients have donated money to candidates, officeholders, or parties. *See* Hickmott Dep. at 46-47, 50-51; Cross-Exam. of Andrews at 19-20. However, the evidence clearly shows that some lobbyists believe that contributions help them gain access to lawmakers. Lobbyist Andrews states:

> The amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system. Some lobbyists help raise large "soft money" donations and/or host many fundraising events for key legislators. Some simply represent a single client with very deep pockets and can easily reach into large corporate or union funds for "soft money" donations or other allowable expenditures that may influence legislative actions. Those who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists with the most political clout.

Andrews Decl. ¶ 12 [DEV 6-Tab 1]. Andrews testifies that it has become a common practice for lobbyists to "host a number of fundraisers." He explains that "[w]hereas the political parties periodically organize 'gala' events in large ballrooms filled with hundreds of donors, lobbyists now often prefer attending smaller events hosted by other lobbyists, with only ten or fifteen people participating, all sitting at a dinner or breakfast table with the invited guest elected official. This type event allows lobbyists a better opportunity to build more personal relationships and to exchange views." *Id.* ¶ 16.

249. Some lobbyists maintain that "basic" or traditional lobbying activities are alone insufficient to be effective in many instances in lobbying endeavors. To have true political clout, the giving and raising of campaign money for

candidates and political parties is often critically important." Andrews Decl. ¶ 5 [DEV 6-Tab 1]. Lobbyist Daniel Murray testified that

> [a]long with each . . . legislative plan [a plan to "advance the client's legislative agenda"], and essential to achieving the client's goals, I develop a parallel political financial support plan. In other words, I advise my clients as to which federal office-holders (or candidates) they should contribute and in what amounts, in order to best use the resources they are able to allocate to such efforts to advance their legislative agenda. Such plans also would include soft money contributions to political parties and interest groups associated with political issues. Murray Aff. in *Mariani* ¶¶ 6-7 [DEV 79-Tab 58]; *see also* Meehan Dep. in *RNC* at 40-41 [DEV 66-Tab 4] ("[P]ower and influence in Washington is not just the amount of soft money an industry contributes to the political parties. I would say that also it's the amount of PAC money that they contribute to the political candidates, it's the amount of hard money they contribute, it's the amount of lobbying money that they expend in order to influence members of Congress.").

*Public Perception of Corruption*

250. The defendants have offered substantial evidence that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence with, the officeholders of that party that the donor enjoys thereafter.

251. The principal evidence submitted by the defendants in support of their contention that the public perceives an appearance of corruption due to large nonfederal donations to parties is a research poll of 1,300 adult Americans conducted



by two prominent pollsters: Mark Mellman[199] and Richard Wirthlin[200] ("Mellman and Wirthlin Report").

252. The survey was conducted over a period of five days (August 28, 2002, through September 1, 2002), and the pollsters made an average of 4.58 dialings per telephone number in the sample set in order to ensure that the sample was representative. *See* Mellman and Wirthlin Report at 22-23.

253. The study's contact rate was 38 percent, more than double the industry average of 15 percent. *See* Mellman and Wirthlin Report at 23.

254. The rate of refusal of the respondents who refused to be polled was within the normal range for a random telephone

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[199] Mark Mellman is "CEO of The Mellman Group, a polling and consulting firm . . . . Mellman has helped guide the campaigns of some fifteen U.S. Senators, over two dozen Members of Congress, and three Governors, as well as numerous state and local officials. In addition, Mellman works with a variety of public interest organizations ranging . . . and corporate clients . . . He has served as a consultant on politics to CBS News, a presidential debate analyst for PBS, a contributing analyst for The Hotline, National Journal's daily briefing on politics, and is currently on the faculty of The George Washington University's Graduate School of Political Management." Mellman and Wirthlin at 2 [DEV 2-Tab 5].

[200] Richard Wirthlin is "Chairman of the Board of Wirthlin Worldwide, a strategic opinion research firm he founded in 1969, which now is one of the top companies in its field. Wirthlin is perhaps best known as President Reagan's strategist and pollster . . . . *Id.* at 2-3. He is widely respected in the "field of social science research and one of this country's most respected political and business strategists." *Id.* Wirthlin "was chief strategist for two of the most sweeping presidential victories in the history of the United States. In 1981 he was acclaimed Adman of the Year by Advertising Age for his role in the 1980 campaign and in 2001 was one of four Republicans awarded American University's 'outstanding contribution to campaign consulting.' In the same year, he was designated 'Pollster of the Year' by the American Association of Political Consultants." *Id.* at 3. The *Washington Post* named Wirthlin "the prince of pollsters" and George Gallup, Jr. said Wirthlin is "one of the very best at our craft." *Id.*

survey conducted in the United States. *See* Mellman and Wirthlin Report at 23.

255. The pollsters took several steps to avoid bias. *See* Mellman and Wirthlin Report at 24. *See also* Wirthlin Cross Exam. at 40 (explaining that the pollsters took steps to avoid bias by randomly ordering the questions, "so that there is no sequence developed where one question may, if always asked in the same order, affect[] the second question.").

256. The statistical margin of sampling error, that is, the error due to sampling versus if the pollsters talked to every American in the United States, is 2.7 percentage points: the actual opinions of Americans will be within 2.7 percentage points of those reported in the study 95 percent of the time. *See* Mellman and Wirthlin Report at 22. All regions of the United States were represented in the study, based on 2001 Current Population Survey results. *Id.* at 24.

257. No evidence has been presented to show that the methodology used by Mellman and Wirthlin is improper or invalid. *See generally* Wirthlin Cross Exam. (demonstrating that while plaintiffs generally dispute the wording of the questions, they do not contest the validity of the sampling or methodology for conducting the poll).

258. The principal finding of the Mellman and Wirthlin Report relating to whether an appearance of corruption arises out of large contributions to political parties is that: "A significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials." In addition, Mellman and Wirthlin find that many Americans believe that the "views of these big contributors sometimes carry more weight than do the views of constituents or the best interests of the country." Mellman and Wirthlin Report at 6.

259. The Mellman and Wirthlin Report established that 77 percent of Americans believe that big contributions to



political parties have at least some impact on decisions made by the federal government. Fifty-five percent thought big contributions had a great deal of impact; 23 percent thought it had some impact. *Id.*

260. The Mellman and Wirthlin Report established that 71 percent of Americans "think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or even if it's not what they think is best for the country." *Id.* at 7.

261. According to the Mellman and Wirthlin Report, a "large majority (84%) think that members of Congress will be more likely to listen to those who give money to their political party in response to their solicitation for large donations." *Id.* at 8.

262. According to the Mellman and Wirthlin Report, "[o]ver two-thirds of Americans (68%) . . . think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives." *Id.* at 8.

263. Further, the Mellman and Wirthlin Report found that "about four in five Americans think a Member of Congress would be likely to give special consideration to the opinion of an individual, issue group, corporation, or labor union who donated $50,000 or more to their political party (81%) or who paid for $50,000 or more worth of political ads on the radio or TV (80%). By contrast, only one in four Americans (24%) think that a member of Congress is likely to give the opinion of someone like them special consideration." *Id.* at 9.

264. The Mellman and Wirthlin Report did not measure the public's understanding of the campaign finance system, and did not ask if the respondents understood the difference between nonfederal and federal donations. *See* Cross Exam.

of Mellman at 31-35. Mellman testifies that the purpose of the poll was to measure the public's perceptions. *Id.* at 31.

265. The public does not understand the distinction between federal and nonfederal donations and is not aware of campaign finance regulations. *See* Ayres Expert Report ¶ 8(a).

266. The Mellman and Wirthlin Report did not show, nor is there any evidence to suggest, that a correlation exists in the public's mind between the amount of a donor's contribution to a party and the amount of access and influence the donors enjoys thereafter with officeholders, exists *independent* of the use to which the money is used by parties.

267. Moreover, there is no evidence, either in the Mellman and Wirthlin Report or elsewhere in the record, that the public would hold to the same conclusion if it believed that no portion of nonfederal donations could be either given to any federal candidate, or used by the parties to directly affect the election of any federal candidates.

268. Robert Shapiro, a professor at Columbia University, also analyzed public perception of soft money contributions to political parties, by reviewing all publicly available opinion survey data sources. *See* Shapiro Expert Report at 7-8. [DEV 2, Tab 6]. The survey data Shapiro examined was comprised mostly of telephone opinion polls. *Id.* at 8. Specifically, Shapiro focused on "public opinion data based on responses to surveys that were fielded since 1990" to determine the public's answers to several questions, including two questions which read: "To what degree has the public perceived corruption in politics connected to the influence of money and large campaign donations?" and "What have been the public's perceptions and opinions toward the substantial political donations in the form of soft money contributions to political parties?" *Id.* at 3, 8. According to Shapiro, poll results show that the "public has opposed large unregulated



soft money contributions to political parties [and] that the public has been troubled by large soft money donations." *Id.* at 13. In addition, Shapiro concluded that the poll data showed "that a substantial proportion of the public has perceived corruption in the political system, and that we have been losing ground." *Id.* at 11.

269. The defendants also submitted substantial, anecdotal evidence from former and current Members of Congress that their constituents believe that these large contributions to parties present an appearance of corruption. *See* Simpson Decl. ¶ 14 (testifying that "[b]oth during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations"); Senator Baucus, 144 S. Cong. Rec. S1041 (1998) (stating that "[p]eople tell me they think that Congress cares more about 'fat cat special interests in Washington' than the concerns of middle class families like theirs. Or they tell me they think the political system is corrupt."); Senator Feingold, 146 Cong Rec. S4262 (2000) (stating that "[t]he appearance of corruption. . . . We all know it's there. We hear it from our constituents regularly. We see it in the press, we hear about it on the news."); Letter from Representative Asa Hutchinson to RNC Chairman Nicholson dated July 9, 1997, ODP0014-00003-4 (declining to support Nicholson's proposed campaign finance legislation because Hutchinson had to balance Nicholson's concerns "with a concern of my constituents which is that their influence in politics is being diminished by the abuses of soft money . . . . If our party is unable to enact meaningful campaign-finance reform while we're in control of Congress, then I believe this failure to act will result in more cynicism and create a growing lack of confidence in our efforts."); Senator Feingold stated that "[t]he appearance of corruption is rampant in our system, and it touches every issue that comes before us," 147 Cong. Rec. S2446 (Mar. 19, 2001), but also acknowledged that soft

money being used for generic campaign activity is less likely to create an appearance of corruption, Feingold Dep. at 126-27; 147 Cong. Rec. S3248-49 (April 2, 2001) (Sen. Levin) ("[P]ermitting the appearance of corruption undermines the very foundation of our democracy—the trust of people in the system.").

270. The defendants have also submitted a substantial number of press reports which suggest that large donations present the appearance of corruption. *See, e.g.,* Jackie Koszczuk, *Soft Money Speaks Loudly on Capitol Hill This Season,* Cong. Q., June 27, 1998, at 1736; Jill Abramson, *Money Buys A Lot More Than Access,* N.Y. Times, Nov. 9, 1997, at 4; Jane Mayer, *Inside the Money Machine,* The New Yorker, Feb. 3, 1997, at 32; Don Van Atta, Jr. and Jane Fritsch, *$25,000 Buys Donors 'Best Access to Congress',* N.Y. Times, Jan. 27, 1997. at A1; Dan Morgan and Juliet Eilperin, Campaign Gifts, Lobbying Built Enron's Power in Washington, Wash. Post, December 25, 2001, at A01; R.G. Ratcliffe and Alan Bernstein, Political Donors Have the Money, and Get the Time, Houston Chron., May 23, 1999, at 1; *see also* Rudman Decl. ¶ 11; Krasno and Sorauf Report at 19-20; Primo Rebuttal at ¶ 7 (stating that "[t]he news media reinforces this view [that money distorts the political process] by portraying the political process as being driven by campaign contributions . . . ."). Senator Rudman has also commented on the press's reporting that soft money donations create an appearance of corruption: "Almost every day, the press reports on important public issues that are being considered in Congress. Inevitably, the press draws a connection between an outcome and the amount that interested companies have given in soft money . . . . Even if a senator is supporting a position that helps an industry for reasons other than that the industry gave millions to his party, it does not appear that way in the public eye." Rudman Decl. ¶ 11.



271. Finally, the defendants have submitted no evidence that the public either believes, or perceives, that federal officeholders are motivated by anything other than the receipt of financial assistance for their own campaigns when they raise funds for their respective parties.

As to BCRA's restrictions on noncandidate campaign expenditures, I find that

*Issue Advocacy in Modern Campaigns*

272. The record convincingly demonstrates that the overwhelming majority of modern political advertisements do not use words of express advocacy,[201] whether they are financed by candidates, political parties, or other organizations. As a result of this development, Congress found that FECA, as construed by the courts to only limit independent expenditures containing express advocacy, as defined by *Buckley,* was no longer relevant to modern political advertisement. *See, e.g.,* 148 Cong. Rec. S2117 (2002) (Senator James Jeffords) ("The 'magic words' standard created by the Supreme Court in 1976 has been made useless by the political realities of modern political advertising. Even in candidate advertisements, what many would say are clearly advertisements made to convince a voter to support a particular

[201] In *MCFL,* the Supreme Court held that the prohibition on corporations and labor unions using general treasury funds on expenditures in connection with a federal election was overbroad, narrowing the restriction to corporate and union spending on "express advocacy." *MCFL, 479 U.S. at 249* ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). In *Buckley,* the Supreme Court provided examples of express advocacy: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley,* 424 at 44 n. 52. These examples have been referred to as the "magic words" because if they are invoked by an organization, they trigger FECA's limitations. *See e.g., FEC v. Christian Action Network,* 110 F.3d 1049, 1052-53 (4th Cir.1997) ("[T]he court declined to 'strictly limit' express advocacy to the 'magic words' of *Buckley's* footnote 52").

candidate, only 10 percent of the advertisements used the 'magic words.'").

> Federal candidate ads appeared nearly 236,000 times in the top 75 media markets in 1998, 430,000 times in 2000. In 1998, just 4 percent of these spots used verbs like 'vote for', 'elect', or 'defeat'; in 2000, just 5 percent did. Including slogans like 'Smith for Congress,' 10 percent of the candidate ads aired in 2000 would qualify as electioneering using the magic words test. The remaining 90 percent could have been categorized as issue advocacy had a party or group sponsored them.

Krasno & Sorauf Expert Report at 53-54 [DEV 1-Tab 2] (citing Jonathan Krasno & Kenneth Goldstein, "The Facts about Television Advertising and the McCain-Feingold Bill," (PS: Political Science and Politics, No. 2:207-212), 2002).

273. The absence of "magic words" does not impede the ability of media consultants to create an electioneering message. "In fact, candidates rarely use the magic words in their own ads."' Magleby Expert Report at 15 [DEV 4-Tab 8]. Former Senator Warren Rudman observed that "[m]any, if not most, campaign ads run by parties and by candidates themselves never use . . . 'magic words.' It is unnecessary." Rudman Decl. ¶ 18 [DEV 8-Tab 34].

274. Political consultants clearly support the conclusion that modern political advertisements rarely use the "magic words" to convey their message.

*Republican Political Consultant Douglas L. Bailey*[202]

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[202] In 1968, Bailey founded Bailey, Deardourff & Associates, which was among the first national political consulting firms, working for Republican candidates for Governor, Congress, Senate, and President. The firm's clients included Gerald Ford's Presidential Campaign, and over fifty successful campaigns for governor or the United States Senate in 17 states. Bailey Decl. ¶ 1 [DEV 6-Tab 2]. As campaign consultant,



> In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as "vote for" or "vote against." If I am designing an ad and want the conclusion to be the number "20," I would use the ad to count from 1 to 19. I would lead the viewer to think "20," but I would never say it. All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians.
>
> The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as "vote for" is at best a historical anachronism.

Bailey Decl. ¶ ¶ 3-8 [DEV 6-Tab 2].

*Democrat Political Media Consultant Raymond Strother*[203]

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Bailey's job was "to plan the campaign and then create broadcast advertisements that would shape its outcome." *Id.* ¶ 2. In 2000, Bailey was among the first eight recipients of the American University-Campaign Management Institute's 'Outstanding Contribution to Campaign Consulting' Award given to the consultants "who have best represented the ideals of the profession and shown concern for the consequences of campaigns on public attitudes about our democratic process." *Id.*

[203] Strother is a political media consultant, and President and founder of Strother/Duffy/Strother. Strother Decl. ¶ 1 [DEV 9-Tab 40]. He is also Chairman of the Board of the American Association of Political Consultants, and last year served as its President. *Id.* Since 1967, he has worked for more than 300 campaigns. *Id.* Representative clients at the presidential, congressional, and gubernatorial levels have included Lloyd Bentsen, Paul Simon, Gary Hart, Bill Clinton, Al Gore, Mary Landrieu, and Zell Miller. *Id.* In the last two decades alone, his firm has "helped

> [M]edia consultants prefer putting across electioneering messages without using words such as "vote for." Good media consultants never tell people to vote for Senator X; rather, you make your case and let the voters come to their own conclusions. In my experience, it actually proves less effective to instruct viewers what you want them to do. They have to come to their own conclusion. Americans like to think they make up their own minds and determine their own fate. Without even mentioning an upcoming election, the media consultant can count on the electoral context and voters' awareness that the election is coming. Voters will themselves link your ad to the upcoming election. When viewed months or years after the election a particular ad might look like pure issue advocacy unrelated to a federal election. However, during the election, political ads-whether candidate ads, sham issue ads, true issue ads, positive ads, negative ads or whatever-are each seen by voters as just one more ingredient thrown into a big cajun stew.

Strother Decl. ¶ 4 [DEV 9-Tab 40]; *see also* Strother Cross Exam. at 44 (observing that 90 percent of candidate advertisements Strother has put together in his career have *not* used express advocacy).

*The Distinction Between Candidate-Centered Advocacy and Pure Issue Advocacy Is Not a Function of the Presence or Absence of the Buckley "Magic Words"*

275. The presence or absence of "magic words," as defined in *Buckley v. Valeo*, does not alone determine whether the advertisement was designed to, and will, support or oppose a particular candidate. *See* Magleby Expert Report at 5 [DEV 4-Tab 8]; *see also* Krasno & Sorauf Expert Report at 58

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elect candidates in 44 states and five countries, including 13 Senators, 8 Governors, and scores of Congress members. [His firm has] won more Democratic Primaries than any other firm." *Id.*



[DEV 1-Tab 2] ("The magic words test, however, does not distinguish between [candidate-oriented issue advertisements and pure issue advertisements]; indeed it does not distinguish between ads sponsored by candidates and any type of issue ad, or even between political and commercial advertising. Whatever its utility might once have been, this standard is now irrelevant to how political ads are designed.").

276. Some current and former elected officials also believe that "magic words" no longer help distinguish genuine issue advertisements from electioneering advertisements. 147 Cong. Rec. S3072 (2001) (Senator Russ Feingold) ("People didn't need to hear the so-called magic words to know what these ads were really all about."); 147 Cong. Rec. S3036 (Senator John McCain) ("[W]e can demonstrate that the Court's definition of "express advocacy"-magic words-has no real bearing in today's world of campaign ads.").

277. Indeed, Senator Carl Levin made the following statement on the floor of the Senate in 1998:

> To show the absurd state of the law, at least in some circuits, we can just look at one of the 1996 televised ads that was paid for by the League of Conservation Voters and which referred to House Member Greg Ganske, a Republican Congressman from Iowa, who was then up for reelection. This is the way the ad read:
>
> *It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.*
>
> The ad sponsor claimed that was an issue ad, an ad that discussed issues rather than a candidate, and so

> could be paid for by unlimited and undisclosed funds. If one word were changed, if instead of 'Call Congressman Ganske,' the ad said, 'Defeat Congressman Ganske,' it would clearly qualify as a candidate ad subject to contribution limits and disclosure requirements. In the real world, that one word difference doesn't change the character or substance of that ad at all.Both versions unmistakably advocate the defeat of Congressman Ganske.

144 Cong. Rec. S10073 (1998) (Senator Carl Levin) (advertisement text in italics); *see also* Bloom Decl. ¶ 5 [DEV 6-Tab 7] ("In my experience in campaigns for federal, state and local office, including my involvement in the television advertising we ran in my race for Congress, no particular words of advocacy are needed for an ad to influence the outcome of an election. Many so-called 'issue ads' are run in order to affect election results.").

278. In addition, former Senator Dale Bumpers testified:

> Soft money also finds its way into our system through so-called 'issue advertisements' sponsored by outside organizations that mostly air right before an election. Organizations can run effective issue ads that benefit a candidate without coordinating with that candidate. They have experienced professionals analyze a race and reinforce what a candidate is saying. These ads influence the outcome of elections by simply stating "tell him [the opponent] to quit doing this." The "magic words" test is completely inadequate; viewers get the message to vote against someone, even though the ad may never explicitly say "vote-against-him."

Bumpers Decl. ¶ 26 [DEV 6-Tab 10];[204] *see also* Chapin

[204] After Bumpers retired from the Senate, he spent one year directing the Center for Defense Information, a nonprofit think-tank based in Washington, D.C. Bumpers Decl. ¶ 2. He currently practices law in Washington D.C. at the law firm Arent Fox Kintner Plotkin & Kahn, PLLC. *Id.* ¶ 3.



Decl. ¶ 7 [DEV 6- Tab 12] ("Based on my experience in campaigns for federal and local office, including the television advertising we ran in my races for County Chairman and Congress, I am familiar with political campaign ads. No particular words of advocacy are needed in order for an ad to influence the outcome of an election."); *see also* Paul Dep. at 27-28 [JDT Vol. 25] (Plaintiff Congressman Ron Paul testified that the outside group issue ads run in his 2000 Congressional campaign were intended to influence the election.). Congressman Christopher Shays also testified:

> Although the Supreme Court has identified a limited category of "magic words" that make an advertisement a campaign advertisement, my experience as a candidate and a Member of the House is that this limited test is inadequate to identify campaign ads. Campaign ads need not include phrases such as "vote for," "re-elect" or "vote against" to be effective campaign tools, and the practice of large numbers of so-called "issue ads" before an election proves it.

Shays Decl. ¶ 12 [DEV 8-Tab 35].[205]

279. Some political consultants believe that there is no difference between political advertisements that contain words of express advocacy (i.e., "magic words") and advertisements that are designed to influence federal elections but do not use the "magic words" of *Buckley*.

*Democrat Political Media Consultant Raymond Strother*[206]

> Because it is so easy for consultants in my business to make ads that will influence federal elections without triggering the need to use hard dollars to pay for them, the difference between hard money and soft money is a

[205] Shays has served in the House of Representatives since 1987 as a Representative of the Fourth District of Connecticut. Shays Decl. ¶ 1 [DEV 8-Tab 35].

[206] *See supra* Finding 274 n.203.

joke. If I want to use soft money to influence an election, there is no real difference in what I do to create the ad. The only thing that is different is the tag line at the end. From the point of view of a media consultant, there is no real difference between ending an advertisement with "Vote for Senator X" versus ending an advertisement with "Tell Senator X to continue working hard for America's families." The public simply does not differentiate between ads that are otherwise identical, but contain these slightly different tag lines at the very end. Strother Decl. ¶¶ 3, 8, 11 [DEV 9-Tab 40].

*Republican Political Consultant Rocky Pennington*

Many soft money ads that avoid the magic words are clearly intended to affect federal elections. Parties and interest groups would not spend hundreds of thousands of dollars to runs [sic] these ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after.

*Pennington* Decl. ¶ 10 [DEV 8-Tab 31].[207]

*Democrat Political Consultant Terry S. Beckett*

I am aware of the idea that particular "magic words" might be required in order for an advertisement to influence an election. However, in fact no particular words of advocacy are needed in order for an ad to

[207] Senator Feingold, during his deposition indicated that he receives calls from constituents in response to television advertisements. However, Senator Feingold was not specifically asked if these advertisements were the type covered under Title II of BCRA. Feingold Dep. at 238-239 ("Q . . . . You mentioned ads, and I have shown you ads which say call Senator so and so, contact Senator so and so. Your constituents sometimes do call you and contact you, do they not? A. Yes, they do. Q. And they sometimes talk about issues including abortion, right to life issues and other issues, do they not? A. Yes, they do. Q. In your opinion, are they sometimes affected by advertisements that they have seen on television? A. I'm sure they are.").



influence the outcome of an election. No list of such words could be complete: if you list 50, savvy political actors will find 100 more. For example, many so-called "issue ads" run by parties and interest groups just before an election attack a candidate, then end by supposedly urging the viewer to "tell" or "ask" the candidate to stop being that way. These ads are almost never really about issues. They are almost always election ads, designed to affect the election result. You can see this most clearly in the ones that amount to personal attacks, or that criticize a candidate on several unrelated "issues."

Beckett Decl. ¶ 8 [DEV 6-Tab 3].

*Democrat Political Operative Joe Lamson*

Based on my experience in managing many federal election campaigns, I am familiar with campaign advertising. No particular words of advocacy are needed in order for an advertisement to influence the outcome of an election. When political parties and interest groups run "issue ads" just before an election that say "call" a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect. Parties and groups generally run these pre-election "issue ads" only in places where the races are competitive. These "issue ads" generally stop on the day of the election. For example, these groups could run ads explaining Nancy Keenan's position on the issues after the November general election so that people could discuss them over the Thanksgiving dinner table, but it doesn't seem to work that way.

Lamson Decl. ¶ 6 [DEV 7-Tab 26].

*Former Chair of Plaintiff NRA Political Victory Fund Tanya K. Metaksa*[208]

> Today, there is erected a legal, regulatory wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it. It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.
>
> We engaged in issue advocacy in many locations around thecountry.
>
> Take Bloomington, Indiana, for example. Billboards in that city read,
>
> "Congressman Hostettler is right."
>
> "Gun laws don't take criminals off Bloomington's streets."
>
> "Call 334-1111 and thank him for fighting crime by getting tough on criminals."
>
> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. When

[208] Metaksa served as Chairman of the National Rifle Association Political Victory Fund and as Executive Director of the NRA Institute for Legislative Action. She made the statement above in her opening remarks to the American Association of Political Consultants' Fifth General Session on "Issue Advocacy." INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on "Issue Advocacy," Jan. 17, 1997, at 2 [DEV 38-Tab 25]. During this litigation, NRA Executive Vice President Wayne LaPierre testified that Ms. Metaksa is "someone who was knowledgeable about NRA's political strategies" and was someone who was "a reliable and trustworthy employee of NRA ." LaPierre Dep. at 11 [JDT Vol. 14]. Plaintiffs have not objected to Ms. Metaksa's statement on hearsay grounds and given Mr. LaPierre's comments, I find it trustworthy and rely on it for purposes of these findings.



> we're three months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.

INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on "Issue Advocacy," Jan. 17, 1997, at 2 [DEV 38-Tab 25].

*The Rise of "Issue Advocacy" Campaigns Funded by Corporate and Labor Union General Treasuries*

280. The Annenberg Center for Public Policy ("Annenberg Center") has been studying "issue advocacy" since the early 1990s. *See* Annenberg Public Policy Center, Issue Advocacy Advertising During the 1999-2000 Election Cycle ("Annenberg Report 2001") at 1 [DEV 38 Tab-22]. Based on their research, the Annenberg Center concluded that "[o]ver the last three election cycles the numbers of ads, groups, and dollars spent on issue advocacy has climbed." *Id.*

281. The Annenberg Center estimated that, during the 1996 election cycle, $135 million to $150 million was spent on multiple broadcasts of about 100 advertisements. Annenberg Report 2001 at 1 [DEV 38-Tab 22]. In the next election cycle (1997-98), the Annenberg Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million. *Id.*[209] In the 1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements. *Id.*

282. After studying "issue advocacy" over a seven year period, the Annenberg Study, which was relied on by Congress in drafting BCRA, concluded *inter alia* that:

[209] The report the Annenberg Study produced following the 1997-98 election cycle placed this estimate at between $275 million to $340 million. *Annenberg Public Policy Center, Issue Advocacy Advertising* During the 1997-1998 Election Cycle ("Annenberg Report 1998") at 1 [DEV 6-Tab 6].

> 1) The amount of money spent on "issue advocacy" is rising rapidly.
>
> 2) Instead of creating the number of voices *Buckley v. Valeo* had hoped, "issue advocacy" allowed groups such as the parties, business and labor to gain a louder voice.
>
> 3) The distinction between "issue advocacy" and express advocacy is a fiction.
>
> 4) "Issue advocacy" masks the identity of some key players and by so doing, it deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility.

Annenberg Report 2001 at 1 [DEV 38-Tab 22]. As plaintiffs' expert Raymond J. La Raja stated, "'Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent.'" La Raja Decl. ¶ 24(h) (quoting Annenberg Report 2001 at 1).

283. The Annenberg Center estimated that in the 1999-2000 election cycle, more than $509 million was spent on television and radio "issue advocacy." Annenberg Report 2001 at 4-5 [DEV 38-Tab 22]. The Republican and Democratic parties accounted for almost $162 million (31%) of this spending; Citizens for Better Medicare, $65 million (13%); Coalition to Protect America's Health Care, $30 million (6%); U.S. Chamber of Commerce, $25.5 million (5%); AFL-CIO, $21.1 million (4%); National Rifle Association, $20 million (4%); U.S. Term Limits, $20 million (4%). *Id.* These groups and the two parties accounted for two out of every three (67%) dollars spent on issue ads in the 2000 cycle. *Id.* (noting that other groups spent a combined $166.2 million (33%) on issue advocacy during the 1999-2000 election cycle); *see also* La Raja Decl. ¶ 20(b) & fig. 10 (quoting Annenberg data and noting that "[t]hese figures . . . closely match my own data on party-based issue ads collected by examining financial reports filed with the FEC").



284. Interest groups developed a strategy "by the early 1990s, and especially by 1996. . . to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits." Magleby Expert Report at 10 [DEV 4-Tab 8]. Indeed, defendants' witness and political consultant Douglas L. Bailey noted that it was not until the 1996 election cycle that corporations and labor unions began to make heavy use of "issue advocacy" as a tool of electioneering. Bailey Decl. ¶ 14 [DEV 6-Tab 2].

*Explaining the Shift Toward "Issue Advocacy"*

285. According to defense expert Magleby, the shift toward using "issue advocacy" can be explained by three phenomena. "First, it permits groups and individuals to avoid disclosure. Second, it allows them to avoid contribution limits. Third, it permits some groups (such as corporations and labor unions) to spend from generally prohibited sources." Magleby Expert Report at 18-19 [DEV 4-Tab 8]; *see also* Krasno & Sorauf Expert Report at 50 [DEV 1-Tab 2] ("Avoiding FECA allows advertisers to collect any sum of money from any source they can. Avoiding FECA allows advertisers to conduct their operations without disclosing their activities to the public.").

286. The corresponding rise in "issue advocacy" between the 1996 and 2000 election cycles highlighted the fact that disclosure information relating to the organization purchasing the advertisement was not available because the advertisement was not subject to FECA's restrictions. Magleby Expert Report at 18 [DEV 4-Tab 8] ("The 1996, 1998 and 2000 election cycles all saw examples of groups who sought to avoid accountability for their communications by pursuing an electioneering advertising/election advocacy strategy rather than limiting their activities to independent expenditures or other activities expressly permitted by the FECA.").

287. Groups can raise larger amounts of money in a shorter time frame if they are not bound by FECA's contribution limitations. Magleby Expert Report at 19 [DEV 4-Tab 8] (stating, for example, "groups like Citizens for Better Medicare, Pharmaceutical Research and Manufacturers of America, NAACP National Voter Fund, and NARAL, were able to far exceed what individuals, PACs or parties could do through hard money contributions.").

*Candidate-Centered "Issue Advertisements" That Do Not Contain Words of Express Advocacy Are Distinguishable from "Genuine" Issue Advertisements*

288. "Issue advertisements," according to one study, fall into three categories: candidate-centered, legislation-centered, and general image-centered. Annenberg Report 2001 at 13 [DEV 38-Tab 22]. "Candidate-centered advertisements make a case for or against a candidate but do so without the use of the ten words delineated in *Buckley*." *Id.* (noting that these advertisements "usually present a candidate in a favorable or unfavorable light and then urge the audience to contact the candidate and tell him or her to support the sponsoring organization's policy position."). Legislation-centered advertisements "seek to mobilize constituents or policy makers in support of or in opposition to pending legislation or regulatory policy." *Id.* (noting that these advertisements usually mention specific, pending legislation). Finally, general image-centered advertisements are "broadly written to enhance the visibility of an organization or its issue positions, but are not tied directly to a pending legislative or regulatory issue." *Id.*

289. Other commentators separate "issue advertisements" into two types of categories: candidate-centered (also called electioneering) issue advertisements and genuine issue advertisements. Advertisements designed to genuinely influence debate over a particular issue are known as "true" or "genuine" issue advertisements, while those issue advertisements designed to influence a federal elections are known as "electioneering" or "candidate-centered" issue advertisements. Krasno & Sorauf Expert Report at 65 [DEV 1-Tab 2] ("Advertising data show that there are two distinct types of issue ads, those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering.").



290. Defendant's expert Magleby testified, in effect, that although mentioning a candidate's name is an indicia of an electioneering advertisement, it is not *per se* determinative, as some advertisements that refer to a candidate by name are nonetheless genuine issue advocacy. Defense expert David Magleby wrote:

> A number of indicia make clear that the ads run by individuals and interest groups are in reality electioneering ads that are meant to influence, and do influence, elections: *These electioneering ads generally name a candidate, run close in time to the election, target the named candidate's district, are run primarily in competitive races, and generally track the themes in the featured candidate's campaign.*

Magleby Expert Report at 6 [DEV 4-Tab 8] (emphasis added). Later, when questioned about whether the "presence of the name or likeness of a candidate [in an ad] preclude[s] it from being treated a as . . . genuine issue" advocacy in his study, Magleby stated that he and his team of academics would "presume [an ad] was electioneering" if it referred to a candidate by name or by image and was aired "within the district or state in which the person named or whose image is represented is the incumbent" and "that person is running for office." Magleby Cross Exam. at 79-80. Upon further questioning, however, it became clear that the type of reference to a candidate to which Magleby was referring was not the type *exclusively* contained in a call-to-action line at

the end of an advertisement, but rather one or more references to the candidate in the "body of the ad" in connection with either what the candidate has said about an issue, or how the candidate has voted on an issue. *See* Magleby Cross Exam. at 103-105.

> Q. Didn't you tell me a few minutes ago that there is no such thing as an election issue ad that—well, first of all, haven't you told me that a genuine issue ad, to be characterized as a genuine issue ad, you cannot mention a name of a candidate? A. No. In the context of the ad, not the call lines and so forth. It doesn't mention how [the candidate] voted. It doesn't represent what [the candidate] has said about the issue. The body of the ad has no referent to [the candidate] whatsoever. The only referent to [the candidate] is the call line.

291. Defendants' political consultant Raymond Strother testifies, in effect, that it is very difficult to determine the objective behind an advertisement, particularly when that advertisement is viewed outside the context and time of the election:

> None of us, without understanding the context and the time, can tell you what a sham ad is and a nonsham ad. You can't do that by looking at pictures or even looking at the ads. When I was teaching at Harvard, I brought Doug Bailey up to lecture my class. He showed series of commercials, and he said, "Okay, which is the best commercial," and everybody voted. "The worse commercial," and everybody voted. He said, "You're all wrong. There is no best or worse commercial because none of you are qualified to judge these commercials because you don't know the context in which they were run or the problems they were to solve." When I look at storyboards, I have no way of knowing if they're fake, real, et cetera, because I don't know the time—I don't know anything about them.



Strother Cross Exam. at 90-91.

292. While electioneering issue advertisements almost always refer to specific candidates by name, especially those seeking to influence an officeholder's upcoming vote on pending legislation, genuine issue advertisements are less likely to refer to a federal candidate by name.

Raymond Strother testified:

> In addition to our work for candidates, my firm has also done some (though limited) advertising work for the political parties and for third parties. I would characterize these ads as falling into two distinct categories: true issue ads and electioneering or "sham" issue ads.
>
> True issue advocacy does exist. Over the years, I have designed issue advertising campaigns for, among other issue, tightening seat belt laws, education reform, and the removal of the confederate battle cross from the Mississippi state flag. The education reform ads promoted policies such as reducing class sizes and loosening the protections afforded by tenure so that bad teachers could be more easily fired. These ads were run all across the South; and their sole purpose was simply to educate the public. In Mississippi, my client wanted to change attitudes about the confederate cross on the flag, and explain how it was holding back the state economically. These advertisements were not made to elect or defeat anyone.
>
> These true issue ads did not mention any candidates by name. Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election.

Strother Decl. ¶¶ 5-7 [DEV 9-Tab 40]. During Strother's cross examination, he candidly admitted that during the

course of his 35 year career, less than 10 percent of his work was for issue organizations as opposed to candidates, Strother Cross Exam. at 48 [JDT Vol. 15], and that he had never spent much time working for an ideological organization. *Id.* at 56-59. Indeed, he admitted on cross examination that he did not think he had "ever advised a client who wanted to run an advertisement campaign of some kind that spoke to pending legislation before a sitting legislature." Strother Cross Exam. at 119.

293. Political consultant Raymond Strother, further acknowledged when questioned regarding advertisements that specifically encourage voters to call their legislators regarding pending legislation that a candidate's name would be mentioned in the context of this type of advertisement.[210]

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[210] Moreover, Mr. Strother went on to characterize an interest group's need to refer to a candidate in a legislation-centered advertisement during that time as a "loophole," through which interest groups would evade campaign laws. *Id.* at 119-120. Mr. Strother candidly revealed his personal belief that "independent groups" should be taken "out of our election process" because they "taint it with our money." *Id.* at 120-21. He observes:

> Q. What I'm getting at here is just that there is a possibility, isn't there, that there will be pending legislation, in a period immediately before a federal election, where a group would like to run a campaign targeted at the legislation and not at the election. But, in order for them to do that, they have to refer to the politician who is also a candidate. Isn't that true? A. I think it's a great loophole. Q. Have you thought about this issue before today's cross examination? A. In the context of what I do for a living, you think about things like that, sure. Q. Given that you've never advised a client who has had a legislative initiative that they were trying to oppose or support, have you given concrete thought to the specific problem that, when there's a legislative initiative pending right before an election issue groups need to refer to the candidates, because they are also the office holders, in advocating for or against that pending legislation? A. There are a lot of ways I can look at that considering my opinion on the First Amendment, et cetera. I would like to see those groups out of our of election process. Q. Why is



> Q. Have you ever advised a client who wanted to run an advertisement campaign of some kind that spoke to pending legislation before a sitting legislature? A. I don't think so, but I could be wrong. Maybe my memory isn't good, but I don't think so. Q. Do you have any reason to believe, if you were to do that, that you would not want to run advertisements that specifically encourage the voters to call their member and to tell them which way they should vote on that pending legislative initiative? A. Yes, there's a good chance we would say, "Call Candidate X and let your views be known."

Strother Cross Exam. at 119. *See also* Huard Decl. ¶ 12 ("There are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect .... Also, if an

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> that? A. Because I think they taint it with their money. I think they can come in and overwhelm an election. I give you the example of somebody sending $1,000 and someone else comes in and spends $1 million on the other side. No matter what you want to call it, they have tainted that election. They have influenced that election. They are going to win that election. I don't care if you call it issue advocacy or what you call it. They're going to overwhelm their opponent with the shear volume of what they're doing. I would rather see these independent groups stay out of our elections completely. I wish there was a law that would keep them from interfering, and I wish there was a law that would keep these night riders, which I would call the Triad and people like that, out of our elections. They sweep in with no address but a fax machine, and spread anti-Semitism and then leave and hide. I think it's insidious. I think there ought to be a law against it. I think candidates should run their own ads. Their names should be on the bottom of them. They should spend their own money. If we have to, let's raise the limit so they can raise money, appreciable money.

issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*") (emphasis added); Mitchell Decl. ¶ 11 (stating that "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is ... especially effective by showing them how they can personally impact the issue debate in question.").

294. Political consultant Doug Bailey testifies:

> In addition to the work we did for candidates at Bailey, Deardourff, we also did political ads for political parties and issue groups. When we were creating true issue ads (e.g, for ballot initiatives or more general issues such as handgun control), and when we were creating true party building ads, it was never necessary for us to reference specific candidates for federal office in order to create effective ads. For instance, we created a serious [sic] of ads opposing a gambling referendum in Florida which made no reference to any candidates. We were successful in conveying our message, and the referendum failed two to one.

Bailey Decl. ¶¶ 9-11 [DEV 6-Tab 2] (emphasis added).

295. In contrast, expert testimony in the record also indicated that candidate-centered issue advertisements almost always mention the name of the federal candidate. Krasno & Sorauf Expert Report at 55-56 ("The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. Candidate names appear in virtually all of these spots, with candidates most likely to identify themselves in their ads and candidate-oriented issue ads most likely to identify the opposing candidate (in some pejorative way).").

*The Use of Issue Advocacy by Organizations For Electioneering Purposes*



296. Defense experts Krasno and Sorauf stated:

> Many of [the sponsors of issue advocacy designed to influence federal elections] have been frank about their intent to influence elections. For example, the AFL-CIO in the first issue ad campaign in House elections in 1996 acknowledged its intent to help Democratic candidates, and its results were measured accordingly. The Club for Growth, a conservative Republican group, bluntly discusses its electioneering activities on its website; they include direct contributions, bundled contributions, and issue ads. The goals of the parties, especially in presidential elections where candidates and their agents have been intimately involved in planning and paying for their party's ads, can hardly be doubted. Survey results show that citizens overwhelmingly view these advertisements as intended to influence their support or opposition to particular federal candidates.

Krasno & Sorauf Expert Report at 65 [DEV 1-Tab 2].

297. Defense expert Magleby explains in his expert report that both labor unions and corporations engaged in extensive electioneering communications during the 1996 election cycle.

> The 1996 initiative by labor into unregulated and unlimited electioneering communications was substantial. The AFL-CIO spent a reported $35 million dollars, much of it on television, aimed at defeating 105 members of Congress, including 32 heavily targeted Republican freshmen. Labor broadcast television commercials in forty districts, distributed over 11.5 million voter guides in twenty-four districts and ran radio ads in many others. The labor campaign triggered a complaint to the Federal Election Commission by the National Republican Congressional Committee, which charged that when the AFL-CIO's ads are "heard, read, and seen" as a whole "a reasonable person can only view them as advocating the defeat of a clearly identified

candidate in the 1996 Congressional election." *See In the Matter of AFL-CIO Project '95* (complaint filed with the Federal Election Commission Feb. 13, 1996).

The business community responded to this major effort by labor with their own unlimited and undisclosed communications, again avoiding any of the magic words. Partners in the business response were the National Federation of Independent Business (NFIB), U.S. Chamber of Commerce, the National Association of Wholesaler-Distributors, the National Restaurant Association and the National Association of Manufacturers. Their group, called the "Coalition- Americans Working for Real Change," was active in thirty-seven House races, spent an estimated $5 million on over thirteen thousand television and radio commercials, and mailed over two million letters mainly in support of Republicans, to owners of small business. Others using this tactic in 1996 included Triad Management Services. The activity of Triad Management Services is documented at Center for Public Integrity, "The 'Black Hole' Groups," *The Public-I*, at <www.public-i.org/watch_04_033000.htm>.

Magleby Expert Report at 10 n.7 [DEV 4-Tab 8] (citations omitted); *see also* Mitchell Dep. at 96-97 [JDT Vol. 23] (stating that in 1996, in the 60 days before the election, in terms of dollars spent by the AFL-CIO on broadcast advertising, the substantial majority of that money was spent on ads that mentioned members of the House of Representatives).

298. Evidence presented in the record demonstrates that electioneering advocacy is, at times, a consideration of the AFL-CIO. For example:

1) Mitchell testified that after Congress adjourned on October 3, 1996, the AFL-CIO discontinued its broadcast advertisements "aimed at immediately pending legislative issues." Mitchell Decl. ¶ 42 [PCS 6]. The AFL-CIO then began to run "electronic voter guides" which compared the positions of congressional candidates on various issues. *Id.; see also* FEC MUR No. 4291, General Counsel's Report, June 9, 2000, at 6, INT003838 [DEV 52-Tab 3].



2) A September 18, 1996, memorandum from a polling firm analyzed the likely impact of five issue advertisements in terms of their likely effect on voters. Memorandum from Guy Molyneux and Molly O'Rourke of the polling firm Peter D. Hart Research Associates, Inc., to the AFL-CIO's Special Assistant for Public Affairs, Denise Mitchell, "Ad Targeting" (Sept. 18, 1996), AFL-CIO 001614-16 [DEV 124] ("[The advertisement] Taxes appears to be the single strongest spot, in terms of *reaching the widest range of voters and affecting people's impression of the incumbent's Issue position*. It should especially be directed to younger voters. [The advertisement] Kids is also very strong, and again should be directed to young people. [The advertisements] Medicare, Homes, and Retire are most effective with older audiences. If you can only run 4 spots, [the advertisement] Retire is probably the one to drop.") (emphasis added); *see also* Memorandum from Geoff Garin and Guy Molyneux of Peter D. Hart Research Associates, Inc. to Denise Mitchell, "AFL-CIO Mall Intercepts Survey" (Sept. 13, 1996), AFL-CIO 001582-84 [DEV 124] (Mall Intercept Survey of individuals' reactions to these advertisements including *how the advertisements made the respondents feel about fictitious congressman's position on each issue*); *see also* Mitchell Cross Exam. at 66-75 [JDT Vol. 23]. *But see* Proposed Findings of Fact of the AFL-CIO and AFL-CIO COPE PCC ¶ 19 ("[t]he selection of these subjects [for its broadcast advertising campaign between 1995 and 2001] was not motivated by partisan political

considerations"); Mitchell Decl. ¶ 70 [6 PCS] ("[The indirect effect on election outcomes] has never been the point of our broadcast advertising program, within or outside the 30-and 60-day periods.").

3) On March 29, 1996, Mitchell received a memorandum from a campaign consultant who analyzed political media consultants for the AFL-CIO. The memorandum stated:

Political campaigns are superheated environments where the objective is not, always, to make the best looking spot. The objective is to communicate with the persuadables at the time they are making their decision. Being able to pivot the entire campaign at exactly the right time is the real talent of a media consulting firm. Consequently, there is little reward for great spots. No one knows better than you how consuming this can be.... [These advertisements can be done], but you must understand that you will be asking these political consultants to do it under rules they have never had to follow before.... What [all of these firms can do] is manage the political message in a volatile environment.

Memorandum from Joe Cowart of Joseph Cowart Campaign Consulting to Denise Mitchell, "Political Media Consultants" (Mar. 29, 1996), AFL-CIO 001702-04 [DEV 124]. *But see* Proposed Findings of Fact of the AFL-CIO and AFL-CIO COPE PCC ¶ 19 ("[t]he selection of these subjects [for its broadcast advertising campaign between 1995 and 2001] was not motivated by partisan political considerations"); Mitchell Decl. ¶ 70 [6 PCS] ("[The indirect effect on election outcomes] has never been the point of our broadcast advertising program, within or outside the 30-and 60-day periods.").

4) An October 9, 1996, internal memorandum from the AFL-CIO's Brian Weeks to AFL-CIO's Mike Klein discussed where media buys might be placed to help Dick Durbin in his Illinois Senate race, based on Mr.



Durbin's lack of resources to air advertisements in certain markets. Memorandum from Brian Weeks to Mike Klein, "Electronic Buy for Illinois Senator" (Oct. 9, 1996), AFL-CIO 005244 [DEV 125]. *But see* Proposed Findings of Fact of the AFL-CIO and AFL-CIO COPE PCC ¶ 19 ("[t]he selection of these subjects [for its broadcast advertising campaign between 1995 and 2001] was not motivated by partisan political considerations"); Mitchell Decl. ¶ 70 [6 PCS] ("[The indirect effect on election outcomes] has never been the point of our broadcast advertising program, within or outside the 30-and 60-day periods.").

5) Denise Mitchell indicated that in 1996, in the 60 days before the election, in terms of dollars spent by the AFL-CIO on broadcast advertising, the substantial majority of that money was spent on ads that mentioned members of the House of Representatives. Mitchell Dep. at 96-97 [JDT Vol. 23].

299. Bruce Josten, Executive Vice President for Government Affairs for the U.S. Chamber of Commerce, testified repeatedly that the purpose of the electioneering communications aired during the 1996 federal election was not to influence the election of any federal candidate, but to respond to attack ads paid for by the AFL-CIO and organized by its president, Mr. John Sweeney. Mr. Josten explained that there "were TV markets where John Sweeney ran an ad accusing a member of Congress about their votes on the issues that I mentioned earlier, and in the spring he started running ads that were not true, and we would follow him" with television ads paid for by the Coalition. Josten Cross Exam. at 44. According to Mr. Josten, the AFL-CIO ads attacked Members of Congress who had supported pro-business initiatives and legislation favored by theCoalition. "My objective was to knock down impressions that Mr. Sweeney and his advertisers and campaigns were trying to

undertake and express our viewpoints exactly the opposite of that and let the viewers make their own decision about that dialogue that was being imposed on them." *Id.* at 88. *See also* Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, et. al. ¶ 24 ("Defendants' assertion that The Coalition's 1996 activities show that preelection issue ads are merely candidate ads in disguise is mistaken. Participants in The Coalition were unanimous that its ads were intended to respond to issue ads being run by the AFL-CIO.").

300. There is other probative evidence presented in the record, however, that influencing the elections of federal candidates was also a consideration for the U.S. Chamber of Commerce when crafting "issue advertisements."

> In 1996, the Coalition sought proposals from advertising firms for a "campaign to re-elect a pro-business Congress." TC00698 [DEV 121]. Media consultant Alex Castellanos of National Media, Inc. opened his proposal to the Coalition by stating, "Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress." *Id.;*

The Coalition commissioned firms to conduct polls and focus groups to measure voter responses to their advertise-ments. AV0024-40, 0046-47, 0060-64, 0106-118, 0139-41 [DEV 121]. The Coalition retained two polling organizations in 1996, the Tarrance Group and American Viewpoint, to test whether specific Coalition and AFL-CIO advertisements would make participants more or less likely to vote for particular federal candidates. FEC MUR No. 4624, General Counsel's Report, April 20, 2001, at 22-23 [DEV 53-Tab 6]; Josten Dep. at 68-114 [JDT Vol. 12]. One firm surveyed "voter attitudes nationwide," TC 00513-37 [DEV 121], and another survey tested possible Coalition ads on focus



groups, including one of "Swing Voters." AV0139-41, AV0037-40 [DEV 121].

A June 28, 1996, Tarrance Group memorandum to the Coalition stated that "The net result among swing voters in Cleveland was that 25% of participants were moved closer to voting for a Republican candidate for Congress and about half of the participants were moved against national labor leaders. In other words, the response ads not only leveled the playing field, but put some points on the board for Republican candidates as well." AV139 [DEV 121] (stating that Republican Members of Congress are "currently under attack by AFL-CIO advertising" and are "outgunned and outclassed" and if "targeted Republicans ever hope to be operating on an even playing field during the 1996 election, it will require that an outside voice come to their defense.").

A July 12, 1996, memorandum to the Coalition from American Viewpoint on "Key Findings of the Pre-Test in Des Moines Media Market of Iowa 4" concludes that Congress-man "Greg Ganske is in deep trouble in the Des Moines Market," stating that "this is one of the most challenging districts that could have been chosen to assess the impact of your advertising .... If advertising can move numbers in this district, it should be effective in most other districts. Voters have not yet focused on the union's campaign as only 25% has seen the commercials. As a result, there is still time to reach them with a substantial buy." Memorandum from Gary Ferguson to the Coalition Steering Committee, "Key Findings of the Pre-Test in the Des Moines Market of Iowa 4" (July 12, 1996), NAW0002, 05 [DEV 121].

In late 1996, the Coalition commissioned the Tarrance Group to conduct a detailed post-election analysis. The Tarrance Group, *Coalition Post-Election Survey Analysis,* NAM0206-27, at NAM0213 [DEV 121]. The

Tarrance Group reported:

> The Coalition commissioned this research to assess the impact of their two-month advertising campaign and its relative effect on voters in the face of the very aggressive, year-long campaign sponsored by the AFL-CIO. Given that four of the six Republican candidates tested in this research won their respective races, one could conclude that the Coalition's efforts were a success-as they were in the vast majority of the targeted districts in which the Coalition was involved.

301. There is substantial evidence in the record which shows that candidate advocacy was also a consideration for Citizens for Better Medicare ("CBM"), an organization that was primarily financed by major drug companies and sponsored by PhRMA, an industry trade association. Ryan Dep. at 13 [JDT Vol. 27] ("We solicited funding from the pharmaceutical companies to underwrite our efforts."); *id.* at 10-11 ("PHRMA was really the leading organization to organize and fund CBM."); PH 0379 [DEV 128-Tab 2]; CBM 0029 [DEV 128-Tab 1] (tally of donations from major drug companies to CBM in FY 2001, totaling $39,586,892.32). CBM describes itself as "a grassroots organization representing the interests of patients, seniors, disabled Americans, small businesses, pharmaceutical research companies and many others concerned with Medicare reform." According to the Annenberg Report, CBM spent $65 million on broadcast advocacy in the 60 days prior to the 2000 general election. Annenberg Report 2001 at 4, 20-22 [DEV 38-Tab 22]. There is substantial evidence in the record that this advocacy was candidate-centered. Alex Castellanos, a political consultant with National Media, testified that CBM advertisements often mentioned Members' names. Castellanos Dep. at 63-66; *see also* Ryan Dep. at 68- 72, 79-85. Timothy Ryan, former executive director of CBM, testified that much of CBM's ad strategy leading up to the 2000 election was aimed at supporting candidates attacked in



AFL-CIO advertising. Ryan Dep. at 68-72; Castellanos Dep. at 63-66.

302. The NRA's media consultant noted that the first objective of its advertising campaign was to "influence outcome of presidential election and other key congressional seats in 10 'battle ground' states." McQueen Cross Exam. Exhibit 2, NRA-ACK 17913-15 [JDT Vol. 22].

303. According to its mission statement, the Club for Growth "is primarily dedicated to promoting the election of pro-growth, pro-freedom candidates through political contributions and issue advocacy campaigns." CFG 000217 [DEV 130-Tab 5]. In a brochure soliciting donations, the Club for Growth noted that "Before the elections, the Club plans to invest $1 million in television advertising in key congressional districts to advance our pro-growth issues. This is a tactic the unions have used so effectively against pro-growth candidates. These issue advocacy campaigns can make all the difference in tight races." CFG 000223 [DEV 130-Tab 5]; *cf.* NRW-02814 [DEV 129-Tab 2] (January 2, 2001, fundraising letter from the National Right to Work Committee noted that it had run "more than 1,000 television ads in Virginia, Nevada, Florida and Nebraska shining a spotlight on the differences between the candidates in those states on Right to Work").

304. More than two-dozen organizations, including "political parties, labor unions, trade associations and business, ideological and single-issue groups" spent an estimated $135 million to $150 million worth of "issue advertisements" during the 1995-96 campaign, compared to the $400 million spent on advertising by the federal candidates running for office. *See* Annenberg Report 1997 at 3 [DEV 38 Tab-21]. Almost 86.9 percent of these advertise-ments mentioned a candidate for office or public official by name. *Id.* at 8. "Most" of the groups running these advertisements "declined to make known the identities of their donors." *Id.* at 4.

305. The Annenberg Center reported in 1998 that at least 77 groups ran issue advertisements during the 1997-1998 election cycle costing between $275 and $340 million." Annenberg Report 1998 at 1 [DEV 66-Tab 6]. Overall, 53.4 percent of these advertisements mentioned candidates by name, although 80.1 percent of those advertisements run in the final two months of the campaign mentioned candidates. *Id.*

306. The Annenberg Center further finds that during the 1999-2000 election cycle 130 groups aired 1,100 distinct advertisements, at an estimated cost of over $500 million. Annenberg Report 2001 at 1 [DEV 38-Tab 22]. The report found that 60 percent of distinct radio and television issue advertisements (689 out of 1,139) aired from January 1, 1999, to November 7, 2000, were broadcast for the first time during the final two months of the election cycle. *Id.* at 12. In addition, 73 percent of all the distinct advertisements mentioned a candidate. *Id.* at 14. In terms of television advertisements, the closer the advertisement was aired to election day, the more likely it contained a candidate mention. *Id.* at 15. Between March 8 and August 31, 2000, candidates were mentioned in 72 percent of the television issue advertisements aired. *Id.* After August, 95 percent of the television commercials broadcast mentioned a candidate. *Id.* The report found that during the 2000 election cycle, 89 percent of unique advertisements were "candidate-centered," meaning they made "a case for or against a candidate" without using express advocacy. *Id.* at 13, 14.

*Electioneering Advertisements Have Been Run About Issues In Which the Group Running Them Has No Particular Interest*

307. Candidate-centered issue advertisements, designed to directly affect federal elections but not employing the "magic words" of express advocacy, have been run about issues not pending before Congress. *See* Chapin Decl. ¶ 13 [DEV 6-Tab



12] (testifying that "[t]he Florida Women's Vote project of EMILY's List also ran a television ad in the [2000 Florida Eighth district Congressional] campaign[,] which as I recall was run in the two months prior to the general election[.] The ad praises my record on gun safety and ends with the line: 'Tell Linda Chapin to continue fighting.' This ad is clearly intended to influence the election result. Based on my observations, EMILY's List is not particularly interested in gun control issues. However, they are interested in supporting pro-choice female candidates like me, and this ad serves that purpose."). The Associated Builders and Contractors ("ABC") have also run advertisements that discuss issues that are not of concern to its members. *See* Monroe Dep. at 65-67, 90-91 [JDT Vol. 23] (answering a question regarding advertisements run by the Associated Builders and Contractors which discussed penalties for child molesters, Monroe stated "no, [stronger penalties for child molesters] is not a particular concern to the general public of contractors or general group of contractors." *Id.* at 91; *but see* Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, et. al. ¶ 26 ("In fact, ABC's witness explained that the cited ABC ads [that Defendants assert address subjects distant from the policy concerns of the ABC] reflected public policy concerns of ABC's membership.").

308. During the 2000 election cycle, the Club for Growth gave $20,000 to the American Conservative Union to support an issue advertisement which discussed Senate candidate Hillary Clinton's residency in New York. Keating Dep. at 59 [JDT Vol. 12] ("Q. Whether or not Hillary Clinton is a resident of New York State really doesn't have anything to do with the Club for Growth's interest in pro-growth conservative Republican elected officials, does it? A. It doesn't seem to directly, no.").

*The Buying Time Studies*

309. The Brennan Center for Justice at New York University Law School ("Brennan Center") produced two studies entitled *Buying Time 1998* and *Buying Time 2000* which examined television advertising during the 1998 and 2000 election cycles. *See BT 1998; BT 2000.* Both *Buying Time* studies were funded by the Pew Charitable Trust. *See BT 1998; BT 2000.* The Brennan Center is "primarily a law firm that also does research on a variety of social science issues that includes campaign finance along with criminal justice and other electoral issues and poverty issues." Holman Dep. at 10. The Brennan Center was also involved in the crafting of BCRA and providing analysis of issues being debated in Congress to legislators, the media, and the public. *Id.* at 11. Representatives of the Brennan Center testified in favor of the McCain-Feingold bill, *id.* at 22, and during Senate debate on the legislation, Senators cited to *Buying Time* data and Brennan Center analyses. Holman Dep. Exhibit 3 at 2 [JDT Vol. 10].

310. While the Brennan Center's funding proposal for *Buying Time 1998* states that the study had an academic purpose, evidence in the record demonstrates that the primary purpose was "to fuel a continuous and multi-faceted campaign to propel reform forward." Holman Dep. Exhibit 4 at 2 [JDT Vol. 10]. The proposal reveals that the study was part of a larger strategy to overcome the "obstacles to reform," and notes that the first step in achieving the goal was "to develop a reliable source of information on the nature of the problem." *Id.* at 7. The study had two phases, and it would not even proceed to the second phase if it did not "provide a sufficiently powerful boost to the reform movement." *Id.* at 6; Krasno Cross Exam. Exhibit 4 at 1, 3, 6 [JDT Vol. 14] (explaining that the first phase was to acquire data "and use it to develop a strategy for responding to the threat posed by issue advocacy," and the second phase was to "create policy



recommendations and reports, as well as ... publiciz[ing] these activities on Capitol Hill and beyond").

311. In April or May of 2000, Dr. Kenneth Goldstein of the University of Wisconsin, who had worked on the data set for *Buying Time 1998*, indicated in a request to the Pew Center for another grant that the purpose of the *Buying Time* studies was to further campaign finance reform. Goldstein Dep. (Vol. 1) at 29 [JDT Vol. 8]. Goldstein's request stated that he was "happy to work with others in the policy community to make sure that our study is designed and executed in ways that help move the reform ball forward." Goldstein Dep. (Vol. 1) at 37 & Exhibit 6 at 5 [JDT Vol. 8]. Mr. Seltz, co-author of *Buying Time 1998*, states that while there were a number of purposes behind the study, "the primary purpose was to contribute to the body of knowledge about campaign finance reform and specifically issue advocacy ... and to fill what we viewed to be an empirical void in the literature about issue advocacy." Seltz Dep. at 22 [JDT Vol. 28]. "An independent but related purpose ... was indeed to provide information to ... proponents of campaign finance reform to help them fashion new and better arguments for reform, but arguments that would be based on research that was verifiable, checkable, transparent, reproducible." *Id.* Mr. Holman, a principal co-author of *Buying Time 2000*, did not approach the project with the purpose of producing results that would support campaign reform and had never seen the grant proposal. Holman Dep. at 25-26; *see also id.* at 29-30 ("I was mostly excited about the political science aspect of [the study] .... It was not clear at any point and never explained to me exactly what sort of policy direction that would go in.").

312. Dr. Kenneth Goldstein provided assistance in processing and coding data for the *Buying Time* studies. Goldstein Rebuttal Report at 6. In addition to assembling data sets used in the *Buying Time* studies, Dr. Goldstein also produced an expert report for the purpose of this litigation. *See* Amended Expert Report of Kenneth M. Goldstein (Oct.

2, 2002) ("Goldstein Expert Report"). As part of processing and coding data for the studies, he merged CMAG's two data sets to produce "a single, comprehensive data set." *Id.* He also had university students (at the University of Arizona for *Buying Time 1998* and the University of Wisconsin for *Buying Time 2000*) "assess[] the content, tone, issues addressed, whether the ads mentioned a political candidate or provided a toll-free number to call, etc .... In addition to collecting certain specific information concerning each storyboard reviewed, the study also asked coders: 'In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?'" Goldstein Expert Report at 7. Advertisements that provided information or urged action on a bill or issue were labeled "genuine issue ads" in both studies, whereas those communications that generated support or opposition for a particular candidate were referred to as "sham issue ads" in *Buying Time 1998, see e.g. Buying Time 1998* at 87; and "electioneering issue ads" in *Buying Time 2000, Buying Time 2000* at 30. Each *Buying Time* database consists of 40 million data points. *Id.* at 37.

313. As noted in Findings 316-317, *infra*, Dr. Gibson criticizes the CMAG data underlying both reports. Dr. Arthur Lupia was asked by the Brennan Center to evaluate Dr. Gibson's Expert Report and provided a report detailing his findings. *See* Rebuttal Expert Report of Dr. Arthur Lupia (Oct. 14, 2002) ("Lupia Rebuttal Report").

*CMAG Data Set*

314. The CMAG data set is the basis of the *Buying Time* studies as well as the expert report of Dr. Kenneth Goldstein, which was produced for the defendants.

315. CMAG tracks political television advertising in the top 75 media markets, containing more than 80 percent of U.S. residents. *BT 1998* at 6-7; *BT 2000* at 18; Gibson Expert Report at 7; *see also* Goldstein Dep. (Vol. 1) at 47- 49 [JDT



Vol. 8] (describing how CMAG compiles its data). These 75 markets are geographically dispersed. Goldstein Rebuttal Report at 23; *see also* Goldstein Expert Report App. G at 1-2 (listing the 75 markets monitored by CMAG). In 1998-99 New York was the largest media market with 6,812,540 television households representing 6.854 percent of all television households. Gibson Rebuttal Report Exhibit 2 at 1 (listing 1998-99 Nielson estimates of media markets in order of size). Shreveport was the seventy-fifth largest media market, with 370,990 television households, or 0.373 percent of all television households. *Id.* at 2. For each market, CMAG monitors the four major broadcast networks (ABC, CBS, NBC, and Fox), as well as 42 national cable networks. Goldstein Expert Report App. G at 2-3. The CMAG data sets include two types of data. First, for every political advertisement aired, CMAG provides a transcript of the audio portion of the advertisement and a storyboard consisting of a still capture of every fourth second of the video portion of the advertisement. Goldstein Expert Report at 6. Second, CMAG provides data on each airing of an advertisement, including time, length, station, show, and estimated cost. *Id.*

316. The CMAG data is underinclusive in that it does not track every political advertisement that is aired. Goldstein Dep. (Vol. 1) at 52 & Exhibit 9 at 16.

1) The CMAG does not monitor local cable advertising in the 75 markets it covers. Gibson Expert Report at 8; Gibson Rebuttal Report at 24.

2) The 1998 and 2000 CMAG data sets did not cover advertisements broadcast in the nation's 140 smallest media markets, which are more rural than the 75 captured by CMAG. Goldstein Dep. (Vol. 2) at 9-10 & Exhibit 9 at 16 [JDT Vol. 8]. For those markets covered, the evidence shows not all advertisements are captured by CMAG. Dr. Goldstein participated in a validity study of the CMAG data by comparing the CMAG data with a sampling of invoices

from eight television stations. *Id.* Exhibit 9 at 16. The results show that for seven of the stations, 97 percent or more of the advertisements listed on their invoices correlated with the CMAG data. *Id.* at 16-17 & 28 (tbl. 2). For one station, however, 20 percent of the advertisements accounted for in the station's invoices could not be found in the CMAG data. *Id.*

3) Another shortcoming of the CMAG data is that although it provides 100 percent of the advertisements' audio, it only provides snapshots at four second intervals of the advertisements' video. As such, 25 percent of the advertisement storyboards for the 1998 data set do not display the name of the group sponsoring the advertisement. Goldstein Dep. (Vol. 2) at 21 [JDT Vol. 8]; Gibson Expert Report at 8.

4) Another perceived shortcoming of CMAG is that it tracks markets not electoral districts, and is unable to distinguish between different versions of ads that are identical with the exception of the candidate or officeholder's name (also known as "cookie cutter" advertisements). Gibson Expert Report at 7; Gibson Rebuttal Report at 7; Goldstein Dep. (Vol. 2) at 113 [JDT Vol. 8].

5) The CMAG Data Set does not measure advertisements aired in the 30-day period preceding primary elections. *See* Krasno Rebuttal Report at 13.

317. In regard to the gaps in station invoices when compared to the number of advertisements captured by CMAG, *see supra* Finding 316, Dr. Goldstein believes it could be the result of inadequate record keeping by the station as well as CMAG omissions. *See* Goldstein Dep. Exhibit 9 at 17 n.3. Dr. Gibson, however, finds this to be a major shortcoming of the CMAG data. Gibson Rebuttal Report at 5-6. He deduces from these missed advertisements that CMAG "likely missed 1,764 ads," or 5.04 percent of these eight stations' airings, and using these figures estimates "that



48,864 airings that in fact were broadcast [nationwide]. . . were not captured by the CMAG methodology." *Id.* (applying the 5.04 percent figure to the total number of advertisements captured by CMAG). Dr. Gibson assumes that CMAG has missed the same percentage of advertisements in all the covered media markets. Moreover, although "we do not know any of the characteristics of these . . . missing airings," Dr. Gibson believes those airing were missed because they "did not have a clear 'political purpose' that could be discerned by the CMAG analysts." *Id.* at 6; *but see* Goldstein Dep. (Vol. 2) at 12 [JDT Vol. 8] (stating that commercials provided to CMAG by Competitive Media Reporting[211] is "overly inclusive," including "ads for the Red Cross, [and] ads for electric companies").

318. While acknowledging CMAG's underinclusiveness, Dr. Lupia believes that Dr. Gibson, "presents no evidence or reason to believe that . . . including advertisements from the markets not covered would change [the] results [of studies based on the data]." Lupia Rebuttal Report at 28; *see also* Goldstein Rebuttal Report at 24 ("Moreover, Professor Gibson does not offer any reason to believe that the ads run on local cable advertising are significantly different than the broadcast ads captured by CMAG."). According to Dr. Goldstein, Dr. Gibson did not suggest that "CMAG's inability to capture local cable spots introduced any systematic bias into the data." Goldstein Rebuttal Report at 24. According to Dr. Goldstein, the "snapshot" style of the CMAG storyboards does not compromise the "ability to accurately analyze the content of ads, especially because CMAG provides a complete transcription of the audio portion of the ad along with the video captures." Goldstein Rebuttal Report at 24-25.

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[211] CMAG gets [its] data from Competitive Media Reporting, a company that tracked advertising in the top 75 markets in 1998 and 2000, but now tracks advertising in the top 100 markets. Goldstein Dep. (Vol.1) at 47.

Furthermore, Dr. Goldstein states, "there is no reason to believe that there in [sic] any systematic bias associated with the CMAG terminology capturing only one video frame every four seconds." *Id.* at 25. As for the 25 percent of 1998 storyboards which did not indicate the advertisement's sponsor, the *Buying Time 1998* authors were able to remedy this problem by referring to the "CMAG's original coding (which accurately provides the sponsor of the ad in well over 95 percent of cases), examining the content of the ad, and, in a few cases, by phoning television stations." *BT 1998* at 8.

*Buying Time Findings* 319. *Buying Time 1998* drew a number of conclusions with regard to the nature and effect of political advertising in the United States. The study's main findings include:

> 1) Four percent of candidate advertisements used "express advocacy" terms. *BT 1998* at 9.
>
> 2) The proportion of issue advertisements mentioning a candidate rises as the date of the election approaches. In July and August 1998, 61 percent of issue advertisements mentioned a candidate. By September, the percentage reached 82 percent and for the remainder of the campaign remained at 82 percent or higher, reaching a peak of 97 percent in the first half of October. *Id.* at 87, 103 (fig. 4.15).
>
> 3) Forty-one percent of issue advertisements that provided information or urged action appeared within 60 days of the election, but only 2 of those advertisements, or seven percent, referred to a candidate. *Id.* at 109.

320. *Buying Time 2000*'s key findings from the 2000 election cycle included:

> 1) Seven percent of all political advertisements contained express advocacy terms. *BT 2000* at 73. Candidates used express advocacy terminology in 10 percent of their ads, *id.* at 15, 29, while political parties and interest groups used such terms approximately two percent of the time, *id.* at 73.



> 2) "Genuine issue ads" (those urging action on a public policy or legislative bill) were "rather evenly dispersed throughout the year, while group-sponsored electioneering ads [which promote the election or defeat of a federal candidate] make a sudden and overwhelming appearance immediately before elections." *Id.* at 56.
>
> 3) The study found that if BCRA had applied to the 2000 campaign, three genuine issue ads (which aired 331 times) would have fallen within the Act's definition of "electioneering communication." *Id.* at 73. Put another way, of the advertisements run within 60 days of the 2000 election which also depicted a candidate, 99.4 percent constituted electioneering advertisements, while 0.6 percent were genuine issue advertisements. *Id.* at 72 (fig. 8-2).

321. Plaintiffs' expert, Dr. James L. Gibson, while leveling various criticism at both *Buying Time* studies, does not dispute that express advocacy words "are rarely used in political advertising, or that group sponsored ads that mention candidates tended to be concentrated before an election." Goldstein Expert Report at 38-39; *see also* Lupia Rebuttal Report at 9; *see also* Gibson Expert Report at 11 ("Entirely objective characteristics of the ads . . . present few threats to reliability."). Neither does he challenge the findings that advertisements sponsored by parties and interest groups comprise a significant and increasing portion of political advertising broadcast in federal races. Lupia Rebuttal Report at 9.

*Criticism of Buying Time 1998*

322. Dr. Gibson raises several objections to *Buying Time 1998* and *Buying Time 2000* reports, and ultimately concludes that neither report can "be accepted as accurate and valid descriptions of the nature of political advertising in the 1998 and 2000 elections." Gibson Expert Report at 66. While not listing every objection, Dr. Gibson's chief objections are as follows: (1) *Buying Time* is not a product of scientific inquiry

as scientific principles of objectivity were not adhered to, *see* Gibson Expert Report at 3 & n.3, 45; (2) neither *Buying Time* study was subject to peer review, *id.* at 4, 45; (3) the results of the *Buying Time* studies could not be replicated, and social science "demand[s] that statistical analysis be replicable, *id.* at 5. *See also id.* at 47-48; (4) the statistical techniques employed by the *Buying Time* authors were questionable, *id.* at 5; (5) the shortcomings of the CMAG database preclude reliance on the *Buying Time* results, *id.* at 5-9; (6) the student coders were not trained, and steps were not taken to ensure their impartiality, *id.* at 9-10; (7) the reliability of the coded data due to the lack of guidelines for coders answering questions and the coding of subjective characteristics of the advertisements, *id.* at 11-12; (8) the results cannot be relied upon because the miscoding of a single document can have "quite large consequences for the statistical results," *id.* at 22-23; (9) inaccurate coding of questions, even if the coding was consistent, *id.* at 17; (10) the wording and coding of Question 6 in *Buying Time 1998* is flawed, and Question 22 is superior, *id.* at 32-34; and (11) "no single *Buying Time 1998* Data Set exists" due to continual changes by Dr. Goldstein, *id.* at 11. Defendants' witnesses Dr. Kenneth Goldstein, Dr. Jonathan Krasno and Dr. Frank Sorauf, and Dr. Arthur Lupia each counter Dr. Gibson's allegations in their expert reports and rebuttal reports. *See generally* Goldstein Expert Report; Goldstein Rebuttal Report; Krasno & Sorauf Expert Report; Krasno Rebuttal Report; Lupia Rebuttal Report. After reviewing the expert reports, I find that although the *Buying Time* studies contain some flaws and shortcomings, as pointed out by Dr. Gibson, those shortcomings do not detract from the studies' credibility and reliability. I make the following findings in regard to Dr. Gibson's objections:

323. First, while I agree that the primary purpose of the *Buying Time* studies wasto further campaign finance reform, I do not find that this fact has skewed the results of the study. *See* Krasno Rebuttal Report at 2 (admitting that *Buying Time*



*1998* is an advocacy document, but stating that "[s]cholars rarely embark upon research without some expectations as to its results. But more than most scholars, we had a compelling reason to insure that our results could withstand allegations of bias"); Lupia Rebuttal Report at 10-11 (stating that Dr. Gibson's claim that the policy perspective of the *Buying Time 1998* authors "may have undermined the integrity" of the study "is pure speculation," and that a "person's political or ideological beliefs need not prevent them from being an effective scientist," and that he knows of no "conventional canons of scientific objectivity"); Goldstein Rebuttal Report at 8 (denying the charge that he or anyone under his supervision "perverted" the results of the databases, and maintaining that his approach to the coding was based on nothing other than "the spirit of scientific inquiry and objectivity").

324. Second, I find that while the submission of statistical studies to peer review processes is preferable, it does not "seriously limit[] the confidence one can place in the Report," as Dr. Gibson alleges. Gibson Expert Report at 45; *but see* Lupia Rebuttal Report at 13 (stating that the significance of the lack of peer-review is "doubtful . . . at best").

325. Third, while Dr. Gibson maintains that his inability to replicate the *Buying Time 1998* and *Buying Time 2000* results "undermines . . . any confidence one should place in the findings," Gibson Expert Report at 5, his inability seems attributable to his using the incorrect data set. *See* Krasno Rebuttal Report at 6-7 & n.6, 8 n.10 (attributing Dr. Gibson's failure to replicate the results to Dr. Gibson's not using "the original command files used to produce the numbers in *Buying Time 1998,*" and maintaining that the original command files replicate the *Buying Time 1998* results); *see also* Goldstein Rebuttal Report at 18, 19-20 (stating that the reason Dr. Gibson could not replicate the results of *Buying Time 2000* was because he was using the wrong data set); *id.* at 20 (using the "federal.sav" data set produced by the Brennan Center, Dr. Goldstein was "able to replicate key

findings of the *Buying Time* [*2000*] study," and correlate others "within a fraction of a percentage point"); Lupia Rebuttal Report at 17 ("It is also worth noting that the Plaintiffs and their experts passed up the opportunity to resolve their concerns by replicating the data collection procedure itself."). Replication, as Dr. Krasno admits, "is a core precept of science," but Dr. Gibson "overstates the case by insisting on 'exact' replication." Krasno Rebuttal Report at 6. Notwithstanding the debate between the experts on replication, Dr. Krasno finds, and I agree, that the discrepancy between Dr. Gibson's findings using one data set and the findings of the *Buying Time 1998* and *Buying Time 2000* studies are statistically insignificant. *See* Krasno Rebuttal Report at 7-8 (referring to Gibson Expert Report at 24); *see also* Goldstein Expert Report at 18 n.10 (stating that the variances in Dr. Gibson's results "are so small as to suggest their own triviality"); Lupia Rebuttal Report at 43 (stating "the demonstrated discrepancies are small" and the Gibson Expert Report "provides no evidence that such changes affect any of *Buying Time's* major claims").

326. Fourth, Gibson alleges that the statistical techniques used by the *Buying Time* authors are questionable; despite this charge, Dr. Gibson does not specifically identify how statistical procedure was misapplied. *See* Lupia Rebuttal Report at 18-19; *see also id.* at 19 (characterizing Dr. Gibson's critique as a "difference in point-of-view on how to categorize certain events that has nothing to do with statistical techniques *per se*.'').

327. Fifth, I find that although the CMAG database has some shortcomings, Dr. Gibson has not demonstrated that these shortcomings undermine the conclusions of the *Buying Time* studies. *See* Gibson Rebuttal Report at 5-7 (stating he has no basis for verifying that the CMAG data base is accurate, that there is no way of knowing the characteristics of the missing airings, but concluding that the "apparent[]'' errors caution against relying on the CMAG data for drawing



conclusions on the nature of political communications); *see also* Goldstein Rebuttal Report at 23 (stating that Dr. Gibson "does not even attempt to explain how these alleged limitations undermine the validity of the conclusions set forth in *Buying Time*''); Krasno Rebuttal Report at 5.

328. Sixth, I find that the failure to train the student coders is justified given Dr. Krasno's concerns that a "training program would have caused complaints that Dr. Goldstein and I were attempting to impose our standards on the coders" and that the researchers "were hoping for a (reasonably informed) ordinary viewer's impression of the ads." Krasno Rebuttal Report at 5 n.4; *see also id.* (explaining that "[l]imited pre-testing of the coding instrument showed that training was unnecessary because coders were apparently able to understand and answer the questions without further explanation."); Goldstein Rebuttal Report at 32 (stating that the lack of training was "a deliberate choice that is well-supported by social science principles .... aimed at getting the untutored common-sense impression of the coders, while minimizing the possibility of biasing coders with any preconceived notions that might have been implicit in a set of instructions," and that formal training "would only undermine the independence of the coders' assessments and possibly introduce systematic bias into the survey."); *id.* (contending that the lack of training also made it easier to "simulate ... the experience of a typical viewer watching the ads at home."). Furthermore, although Dr. Gibson is concerned with the training of the coders, his concerns are, as Dr. Goldstein explains, speculative because Dr. Gibson did not "conduct his own survey, using his own coders and his own training techniques, and compare it to the results reached by the undergraduate coders." Goldstein Rebuttal Report at 31; *see also* Lupia Rebuttal Report at 33 ("In this case, such a replication would have been relatively simple to conduct ... and would have allowed the [Gibson] report to rely less on speculation when alleging that measurable attributes of

Goldstein's coders affected the data collection or analysis."). Finally, I also find that evidence has not been presented to substantiate Dr. Gibson's concern that the student coders were unrepresentative of the general population, thereby threatening the accuracy of the *Buying Time* results. *See* Lupia Rebuttal Report at 35 (stating that "only if we had evidence that the way in which the undergraduates were unrepresentative caused *Buying Time*'s claims to differ from what a representative population would have produced" would there be a basis to believe the coders' unrepresentativeness threatened the quality of the data, but the Gibson "report presents no such evidence."); Holman Dep. at 241-42 (noting "it's common practice to use students as survey respondents especially in political work").

329. Seventh, I find that Dr. Gibson's objections regarding the reliability, or accuracy, of the coded data due to the coding of "subjective and judgmental" characteristics do not prevent this Court from relying on these studies as the *Buying Time* authors were seeking to measure the coders' opinions and perceptions. Gibson Expert Report at 12. Dr. Gibson uses Question 6 as an example.[212] Question 6 appears in *Buying Time 2000* as Question 11, except that the *Buying Time 2000* version does not bold the words "particular candidate" and does not ask the coder to skip Questions. *See* Goldstein

[212] The text of Question 6 in *Buying Time 1998* is as follows:

> In your opinion is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?
>
> 1. Provide information or urge action (If so, skip to Question # 19)
>
> 2. Generate support/opposition for candidate
>
> 3. Unsure/unclear

Gibson Expert Report at 12 (citing *Buying Time 1998* ) (emphasis in original).



Expert Report App. F [DEV 3-Tab 7]. Dr. Gibson believes that it is not always readily apparent who the sponsor of the advertisement is, making it difficult for the coder to know whose purpose he or she is supposed to be evaluating. Gibson Expert Report at 12. According to Dr. Gibson, this problem is exacerbated by the lack of "explicit guidelines for how to ascertain an 'ad's purpose,'" and, given the subjective nature of this task, "certain procedures are essential so that the reliability of the data collected can be assessed." Gibson Expert Report at 12, 16. Further, Dr. Gibson states that there is "no assessment whatsoever of intercoder reliability [for *Buying Time 1998*]. Thus, unlike academic research based on subjective coding, no empirical evidence exists to indicate that the coders' subjective assessments of these ads were accurate." *Id.* at 18. Dr. Lupia responds arguing that the "practice of treating answers to opinion questions as objective phenomena is common in science." Lupia Rebuttal Report at 38 (describing an article co-authored by Dr. Gibson, the main conclusion of which is based on a survey where participants were asked about how they described their own identities). He notes that Question 6 begins with "In your opinion," and seeks to understand how the advertisements are perceived. *Id.* at 37.

330. Eighth, while I acknowledge that the impact on the *Buying Time 1998* results due to miscoding hypothetically could have, in the words of Dr. Gibson, "quite large consequences for the statistical results," Gibson Expert Report at 22-23, Dr. Gibson admits he is providing only an example of how one error *could* affect the *results*. *See id.* (explaining that if Advertisement #11 was coded as promoting issues rather than a candidate, the percentage of pure issue advertisements in the *Buying Time 1998* data set would rise six percentage points). As the evidence regarding the impact of miscoding is hypothetical, or speculative, I find that it does not undermine the conclusions of the study.

331. Ninth, I find that Dr. Gibsons' argument that even though the coders may be consistent in their coding, their coding could still be incorrect, misrepresents the purpose of the *Buying Time* studies and what the coders were asked to do. Gibson contends that:

> coders must seek easily discernable 'cues' in the advertisements as a means of making the required judgment. Since the presence of a political figure who seems to be a candidate is a readily accessible cue, the coders then develop an implicit decision rule that says: 'when a political figure is depicted in the ad, the ad involves electioneering.' Under this rule, the variable might be reliably coded. But this does not mean that the data are *valid*, since political figures appearing in ads could well be doing something other than electioneering.

Gibson Expert Report at 17 (emphasis in original). While Dr. Gibson may be correct that an advertisement may "be doing something other than electioneering," the study instead is seeking the coders' perceptions of the purpose of the advertisements, not the advertisements' true purpose. *See* Lupia Rebuttal Report at 39. Just because coders' perceptions may not comport with reality does not threaten the validity of the data, because the survey seeks the coders' mental impressions. *Id.* However, when codings were changed on Question 6, the mental impressions of the coders, which were sought by the question, were overruled. Goldstein Dep. (Vol 2) at 208-209 [JDT Vol. 8].

332. Tenth, I reject Dr. Gibson's argument that Question 22 of *Buying Time 1998* is superior to Question 6, and that where the coding of Question 6 and Question 22 are inconsistent, Question 22 should be relied upon. The text of both questions is listed below:

> 6. In your opinion is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?
>
> 1. Provide information or urge action (If so, skip to Question #19)
>
> 2. Generate support/opposition for candidate
>
> 3. Unsure/unclear
>
> 22. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Personal characteristics
>
> 2. Policy matters 3. Both
>
> 4. Neither



Gibson Expert Report at 12 (citing *Buying Time 1998*) (emphasis in original), 31-32. Dr. Gibson notes that, according to Question 6, 55.6 percent of the advertisements were coded as "promoting candidates." *Id.* at 31. Dr. Gibson also notes that, in response to Question 22, 98.1 percent of the advertisements "aired within 60 days of the election and depicting a candidate were coded as having a "primary focus" on policy matters." *Id.* at 32 (emphasis in original). While Dr. Gibson finds these results contrary to what one might expect, he also finds it "reasonable" that coders would conclude that almost all (98.1 percent) advertisements have a "primary focus" on policy, but also conclude that half of those same advertisements have the "purpose" of promoting a candidate. *Id.* at 32-33. Nonetheless, Dr. Gibson argues that coding of Question 6 is "deeply flawed," and where Question 6 and Question 22 "clash . . . the coding of Question 22 should be considered more valid and reasonable." *Id.* at 34, 35. Although I acknowledge that Question 6 does not provide coders the option of finding that the advertisement promotes *both* issues and candidates, and "does not ask the coder to discern the 'primary' purpose of the ad" but instead asks coders to provide their opinion on the advertisement's

"purpose," *id.* at 33-34, I find that the coding of Question 6 can be relied upon by this Court. As Dr. Krasno points out, "coders rated 99 percent of candidate ads (and 93 percent of party ads) as generating support or opposition for a candidate." Krasno Rebuttal Report at 10 (citing *BT 1998* at 41). This conclusion is bolstered in Dr. Krasno's opinion by the fact the coders were not asked to determine the sponsor of the advertisement and that the disclaimers on the storyboards provided to the coders were often difficult to read. *Id.* at 10 n.14. An electioneering advertisement does not have to focus primarily on personal characteristics of a candidate; in fact, "political scientists routinely take the view that politicians frequently adopt and advertise policy positions in order to appeal to voters." *Id.* at 10-11 (citing as an example Anthony Downs, An Economic Theory of Democracy (1957)); *see also* Goldstein Rebuttal Report at 29 n. 16 (citing four articles for the proposition that "policy issues in electioneering ads is widely noted in the political science literature"); Seltz Dep. at 188 [JDT Vol. 28]. Moreover, as Dr. Lupia explains, an advertisement's purpose (the question posed in Question 6) and its primary focus (the question posed in Question 22) do not have to be the same. Lupia Rebuttal Report at 46-48. To illustrate this point, Dr, Lupia notes that many beer commercials do not focus on the product, but rather people "engaged in a range of activities that we can call 'wild nights out.'" *Id.* at 47. It would not be unreasonable to "perceive that the purpose of the ad is to get" the viewer to buy the beer, "but to judge its primary focus as wild times." *Id.* at 48. Further, I find that the evidence supports Dr. Lupia's argument that individuals can make the same distinction for campaign advertisements, i.e., that their purpose is to get the person to vote for candidate X, but their focus is on issue Y. *See id.* In addition, I do not believe that Question 6 must include a qualifier, such as the word "primary" in Question 22, in order to be valid. A study co-authored by Dr. Gibson based on a survey question on social identity does not



mention the word "primary," but concludes that the initial responses given revealed *primary* social identities. *See* Lupia Rebuttal Report at 51 (quoting James L. Gibson & Amanda Gouws, Social Identities and Political Intolerance: Linkages within the South African Mass Public, American Journal of Political Science 278-92 (2000)). Dr. Gibson's report "provides no tangible evidence or scholarly reference" that suggests that Question 6's failure to include a qualifier is "inconsistent with standard scientific practice." Lupia Rebuttal Report. at 52. Similarly, Dr. Gibson "offers no direct evidence on how answers to the questions would have changed had we allowed the responses 'both' and 'neither' in Question 6 or the response 'unsure/unclear' in Question 22." *Id.* at 48, 50.

333. Finally, I do not find that the updating and changing of the *Buying Time 1998* Data Set invalidates the database, such that reliance on the *Buying Time 1998* conclusions is unfounded. As Dr. Krasno explained, the short time frame of the study "inevitably meant that small changes to the data set would continue even after the release of *Buying Time 1998*." Krasno Rebuttal Report at 4. Furthermore, the changes in the database reflect "the gradual filling in of missing data and the discovery of internal contradictions. There is no evidence at all in Dr. Gibson's report that any of the changes in the successive versions of the data that he examined had any more than a trivial impact on his results or on those reported in *Buying Time 1998*." *Id.* Dr. Goldstein attributes the changes in the database to random error inevitable in a database, such as that used in *Buying Time 1998*, which consists of 40 million data points, Goldstein Rebuttal Report at 37; "routine 'cleaning' of the data sets," *id.* at 10; and the "standard social science practice" of cleaning "a data set by correcting apparent errors after the codes have been entered in the database," *id.* (citing Herbert F. Weisberg, Jon A. Krosnick & Bruce D. Bowen, An Introduction to Survey Research, Polling, and Data Analysis (3d ed. 1996)). Dr.

Lupia reviewed the multiple databases and concludes that the changes are transparent and he finds no reason to conclude that Dr. Goldstein has attempted to hide anything. Lupia Rebuttal Report at 22. Lupia agrees that Dr. Gibson's concern is a legitimate one; however, large academic databases change for legitimate reasons, so the mere existence of the relative small changes cited in the [Gibson] report provide no basis to negate the project's credibility." *Id.* To Lupia, the important question is "why and how the changes were made," and Dr. Gibson's suggestions of illegitimacy are, in Lupia's opinion, "of varying and questionable credibility." *Id.*

*Buying Time 1998's Calculation of the Percentage of Genuine Issue Advocacy Captured by BCRA*

334. *Buying Time 1998*'s claim that only seven percent of "genuine issue ads" in the 1998 campaign would constitute electioneering communications under BCRA is disputed.

335. *Buying Time 1998* found that seven percent of all pure issue advertisements aired in 1998 identified a federal candidate and appeared within sixty days of the campaign. Krasno Rebuttal Report at 13. This figure was determined by dividing the number of airings of genuine issue advertisements mentioning a federal candidate within 60 days of the election by the total number of genuine issue advertisements run in 1998. *Id.; see also* Seltz Dep. at 115-16. According to Dr. Jonathan Krasno, author of *Buying Time 1998*, the question he sought to answer with this formula was "what is BCRA's impact on pure issue ads?" *Id.* at 12. The Brennan Center stands by the seven percent figure, although for a period of time in 2001 it had questioned its accuracy. Holman Dep. at 142-43. During that period of time, the Brennan Center ran additional analyses and determined that seven percent of "unique issue ads—or in other words . . . special interest groups placing issue ads" produced in 1998 would be captured unfairly by BCRA, *id.* at 123, 144, and that 13.8 percent of all issue advertisement airings



mentioning a candidate and broadcast within 60 days of the 1998 election were genuine issue advertisements, *id.* at 154-55. Dr. Gibson contends in his rebuttal report that the number of genuine issue advertisements aired in 1998 that would have been captured by BCRA represents affects the "communications with a staggering number of household[s]—30, 108, 857. Thus, were these ads . . . prohibited, over 30 million group-citizen communications would be affected." Gibson Rebuttal Report at 25. Defendants' experts do not address this point in their expert and rebuttal reports.

336. Plaintiffs object to the use of the total number of genuine issue advertisement run in 1998 as the denominator. Dr. Gibson finds:

> using a denominator of all issue ads broadcast in 1998 for these calculations is arbitrary and makes little sense. Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996? Why not limit the denominator to ads shown in the last half of 1998? The . . . selected . . . denominator . . . has no theoretical meaning.

Gibson Expert Report at 38; *see also id.* at 41 ("I can see no justification for making the denominator equal to all issue ads aired in 1998."). Furthermore, he argues that given his conclusion that more people are concentrating on political issues as elections draw near, discussed *infra* Finding 357, *Buying Time 1998*'s denominator, by using all issue advertisements run during the course of the year, makes "the assumption that ads aired anytime throughout the year are equally as valuable as ads aired in proximity to the election." Gibson Rebuttal Report at 27. Thus, Dr. Gibson concludes that the "damage of prohibiting an ad within 60 days of an election cannot be ameliorated by allowing that ad to be broadcast at some other point throughout the year." *Id.* at 27-28.

337. Dr. Krasno explains that the *Buying Time 1998* denominator reflects only advertisements run in 1998 because "we had no data from 1997 or the last weeks of 1996 to include in the denominator." Krasno Rebuttal Report at 14. Dr. Krasno believes that the addition of such data into the denominator would simply "*decrease* the percentage of pure issue ads affected by BCRA" because all of those advertisements would have aired more than 60 days before the election and would therefore not increase the size of the numerator. *Id.* at 14-15 (emphasis in original); *see also* Krasno & Sorauf Expert Report at 62 ("The data from which these estimates are derived cover broadcasting only during the 1998 and 2000 calendar years, not the thirteen-plus months preceding them. Were we able to factor in the total number of pure issue ads that appeared between elections, the percentage of pure issue ads affected by BCRA would decline.").

338. Dr. Gibson suggests the better denominator, and one that is not arbitrary, is that used in *Buying Time 2000;* namely, all airings of issue advertisements during the last sixty days of the campaign which also depict a candidate. Gibson Expert Report at 39. The Buying Time 2000 formula answers the question: If one were to assume all issue advertisements mentioning a candidate in the last 60 days of an election campaign had an electioneering purpose, what percentage of the time would this assumption be erroneous? *Id.* at 38-39. By contrast, the *Buying Time 1998* formula answers the question: "What percentage of total ads run throughout the year that mentioned a candidate by name and were coded as providing information or urging action appeared *within* 60 days of the election, rather than *earlier than* 60 days before the election?" *Id.* at 39 (emphasis in original). Dr. Krasno believes that Dr. Gibson's denominator would vary in size "with the amount of candidate-oriented issue advertising before an election. This is particularly relevant because of the volume of candidate-oriented issue ads devoted to presidential campaigns. The result ... is



highly unstable estimates of BCRA's impact from year to year." Krasno Rebuttal Report at 15.

339. The effect of using the *Buying Time 1998* denominator is that the percentage is affected not only by the amount of genuine issue advertisements run within 60 days of the election, but also the number of electioneering advertisements run during that time. *Id.* at 16 n.26. When Dr. Krasno applied Dr. Gibson's denominator to the *Buying Time 1998* data he found 14.7 percent of genuine issue advertisements would be unfairly captured.[213] *Id.; see also* Krasno & Sorauf Expert Report at 60 n.143; *id.* App. at 3 (providing the calculation: 713 airings of three distinct genuine issue advertisements[214] mentioning a candidate and aired within 60 days of an election constitutes the numerator;

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[213] Dr. Gibson, using a different data set than Dr. Krasno, found that by taking *Buying Time 1998's* "flawed numerator and using the Brennan Center's own figures for calculating the proper denominator (airings within 60 days [of the election] ), 16.5% of the group ads were 'genuine issue ads' (as defined by the Brennan Center) . . . ." Gibson Expert Report at 42. He goes on to reject this figure because he "does not accept the numerator." *Id.* He also finds that by using the data set he believed was the "final" version 25.7 percent of issue advertisements aired during 1998 mentioned a candidate and were broadcast within 60 days of the election were "genuine" issue advertisements. *Id.* at 37. Dr. Krasno states that this figure is incorrect because the data set used is incorrect, resulting in a numerator "four times too large," and that based on his study with Sorauf, he now calculates the correct figure to be 6.1 percent. Krasno Rebuttal Report at 19 & Appendix [DEV 1-Tab 2]; *see also* Krasno & Sorauf Expert Report at 60. Dr. Gibson's problems with the numerator are discussed *infra* Findings 340-341.

[214] One of these advertisements, "HMO said No" was aired a total of 455 times (118 times in Greensboro, 126 times in Raleigh-Durham, and 211 times in St. Louis). Krasno & Sorauf Expert Report App. at 3, 20. We were unable to find additional information about the other two advertisements, "CCS/No Matter Who" and "CENT/Breaux." *Id.* In 1998, St. Louis had 1,110,290 television households, Raleigh-Durham had 834,260, and Greensboro had 584,900. Gibson Rebuttal Report Exhibit 2.

the denominator is the 4847 airings of issue advertisements mentioning a candidate within 60 days of the election).

340. Dr. Lupia concludes that although the *Buying Time 1998* and *Buying Time 2000* denominators answer different questions, either formula is reasonable. "If I were asked to assess the proposed regulation's restrictiveness, the [Gibson] report's fraction could provide information about the impact during a particular time period, while *Buying Time* 1998's fraction could provide a better measure of the regulation's impact on issue advocacy more generally." Lupia Rebuttal Report at 25. Lupia states that Dr. Gibson's denominator is no less arbitrary than that of *Buying Time 1998*. *Id.* at 26. Holman comments that the *Buying Time 1998* denominator is "a justifiable way" of determining the impact of BCRA on genuine issue advertisements, although he did not use the same one for *Buying Time 2000*. Holman Dep. at 140. For Holman, the *Buying Time 1998* calculation is "not incorrect. It's a different way of assigning a number to measure a phenomenon." *Id; but see id.* at 153-54 (stating that the text of *Buying Time 1998* relating to the seven percent figure is "[m]isleading" and "ambiguous" in that it did not identify clearly to what it referred).

341. Plaintiffs' and Defendants' experts also disagree as to what the appropriate numerator should be. Dr. Gibson rejected the *Buying Time 1998* numerator because based on the data he was provided he concluded that eight advertisements aired 2,405 times in the last 60 days of the campaign were originally coded as promoting an issue or urging action (genuine issue advertisements) but were overruled by Dr. Goldstein and recoded as electioneering advertisements. Gibson Expert Report at 42. When Dr. Gibson added in these advertisements he found that "nearly two-thirds of the group ads that aired within 60 days of the 1998 election were coded by the students as 'genuine issue ads.'" *Id.* at 43. Dr. Gibson in his Rebuttal Report revises this



figure based on information provided during the course of the litigation, which indicated that over a quarter of the advertisements he added to the numerator did mention candidates, resulting in a figure of 50.5 percent. Gibson Rebuttal Report at 23; *see also* Krasno Rebuttal Report at 17-18 (describing this error). Dr. Gibson concludes that "this 50.5% figure represents the statistical floor . . . the 64% figure cited in my report . . . provides the ceiling." Gibson Rebuttal Report at 24. Dr. Gibson, in his Supplement Report, states that Dr. Krasno had produced additional data files which included an earlier version of the data set upon which he had relied. Gibson Supplement to Rebuttal Expert Report of October 7, 2002: 1998 Data ("Gibson Supplemental Report") at 1. The data showed that one of the eight advertisements Dr. Gibson alleged had been recoded (from "genuine issue" to "electioneering") had originally been coded as promoting the election or defeat of a candidate, and that another was missing data as to the nature of the commercial. *Id.* at 4. As a result of excluding the airings of these two commercials, Dr. Gibson calculates that his "ceiling" fell to 60 percent, and his "floor" remained unchanged. *Id.* at 5-6.

342. Dr. Krasno rejects the inclusion of any of the airings of these eight advertisements in the numerator. *See* Krasno Response to Professor Gibson's Supplemental Rebuttal (Nov. 13, 2002) ("Krasno Response"). He objects to the notion that the recoding "reflects a deliberate effort to manipulate some of the results reported in *Buying Time 1998,*" stating that the recoding aimed to "make the data set as sensible and accurate as possible." *Id.* at 1, 2. Dr. Krasno explains that the decision to recode five of the advertisements was based on their contradictory codings. *Id.* at 2. The survey was constructed so that when a coder found that an advertisement's purpose was to "provide information or urge action" (in other words, was a genuine issue advertisement) in Question 6, the coder was supposed to skip the next 12 questions. *Id.* at 2; Gibson Supplemental Report Exhibit 7. For five of these

advertisements, student coders found the advertisement provided information or urged action, but went on to answer the next 12 questions. Krasno Response at 2. In addition, Dr. Krasno states that "all of these ads were scored in a parallel process on another variable, 'favcan,' as favoring a Democratic or Republican candidate. Again, the potential conflict between question 6 and favcan should have attracted attention as the data set was being prepared." *Id.* Dr. Krasno contends that a review of the storyboards for these five advertisements, as well as other contextual factors such as where and when they were aired, makes it clear that they should be coded as "electioneering." *Id.* at 2-4. Dr. Krasno believes that the "notion that a small handful of mistakes must be perpetuated because they were once made is both ludicrous and an extraordinary departure from the usual practice of compiling data sets. Dr. Gibson's argument would be more credible if he offered any explanation for why these commercials really are pure issue ads." Krasno Response at 5.

343. Dr. Lupia weighs in on the fraction debate, contending that the Gibson and *Buying Time* reports "are reasonable conceptualizations of the question about how the proposed regulations will affect groups in the present and future if groups act exactly as they did in the past. If, however, we want to evaluate the regulations' likely future impact we should consider the possibility that groups will adapt to the new regulations in different ways." Lupia Rebuttal Report at 26. Both sides seek to predict the impact BCRA will have if no one alters their behavior. Lupia concludes that to "the extent that affected groups are able to choose [to alter their behavior], both estimates in the denomination debate may exaggerate the extent to which this aspect of the new regulation will restrict the groups' abilities to express themselves in the future . . . . To the extent that we agree that such groups will adapt in various ways, the credibility of the high-percentage estimates of the likely future impact of the



proposed regulations on interest groups is severely undermined." *Id.* at 27.

*Criticism of Buying Time 2000*

344. Many of Dr. Gibson's criticisms of *Buying Time 2000* are similar to those made of *Buying Time 1998* and are addressed, *supra*.

345. Dr. Gibson states that the *Buying Time 2000* data base "has numerous errors and inconsistencies in it," and comments that these changes preclude him from replicating the findings of *Buying Time 2000*. Gibson Expert Report at 46, 47-48.[215] He is troubled by the fact that Dr. Goldstein changed the coded "purpose" of 62 out of 338 advertisements, *id.* at 52, questions the motivation behind the changes, and asks what standards Dr. Goldstein employed in making the changes, *id.* at 53. Dr. Goldstein states that "most of the 62 'changes' [Gibson] identifies in the 2000 database are not changes at all, but rather original student coding of additional CMAG storyboards that had not previously been coded at all, and were not part of the database used by the authors of *Buying Time 2000*." Goldstein Rebuttal Report at 4. The problem stems from Dr. Gibson's use of the wrong database; he does not analyze the *Buying Time 2000* database, but rather "a later iteration of [Dr. Goldstein's] own version of the database containing [his] own after-the-fact updates and re-codes, including additional ads later received from CMAG. . . . [N]one of this re-coding ever made its way into the *Buying Time 2000* report."[216] *Id.* at 14-15. Dr. Goldstein

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[215] Dr. Goldstein testifies that he does not have the original student coding for this study, explaining that his "political science department . . . mistakenly deleted a big chunk of out files, including our access database." Goldstein Dep. (Vol.2) at 129 [JDT Vol. 8].

[216] For example, Dr. Gibson challenges the *Buying Time 2000* finding that "[o]f all the group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4% were found to be electioneering issue ads. In absolute numbers, *only three genuine issue ads (which aired*

also takes exception to the charge that he deliberately changed the data in order to decrease the number of pure issue advertisements, calling it "baseless." *Id.* at 4. In addition, Dr. Goldstein notes that he reevaluated the coding of 30 advertisements in the 2000 database in his post-*Buying Time 2000* academic research having nothing to do with campaign finance or the *Buying Time* studies and "[i]n 26 of these instances, [] changed the coding from electioneering to genuine issue." *Id.* at 5, 14-15. Dr. Lupia comments that Dr. Gibson fails to connect his bias concerns with actual changes in the database or demonstrate the effects directly. Lupia Rebuttal Report at 58. As such, Lupia finds the charge that the investigators were committed to reaching a particular outcome to be "at best, premature and, with certainty, not proven in the [Gibson] report." *Id.*

346. Dr. Goldstein does find that three advertisements in the *Buying Time 2000* database "were re-coded on Question 11 from 'promoting a candidate' to 'providing information or urging action on an issue.'" Goldstein Rebuttal Report at 16. One was a version of a "cookie cutter" advertisement run by CBM (numbered 1269), which was "extremely similar" to a

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*a total of 331 times in the 2000 elections) would have been defined as electioneering communications . . . .*" Gibson Expert Report at 61 (quoting *BT 2000* at 73 (emphasis in original)). Dr. Gibson finds that according to the database the three advertisements were only aired nine times, but the *Buying Time* authors reported 331 airings and a different data base that Dr. Gibson determines is the "original, student coded version" of Question 11 shows 1,082 airings. *Id.* at 61-62. He declares that he "has confidence in none of these" figures. *Id.* at 62. Dr. Goldstein claims that if Dr. Gibson had used the correct database, "federal.sav," he would have been able to identify the three advertisements which comprise 331 airings. Goldstein Rebuttal Report at 21 (finding advertisements #627 (172 airings), #1389 (81 airings), and #2862 (78 airings)). He also used the database to identify "all ads run by interest groups that mentioned a candidate and aired within 60 days of the election," and using that as the denominator arrived at the same percentage as *Buying Time 2000*. *Id.* (dividing 331 by 53,840).



number of other CBM-sponsored advertisements that (Goldstein thought) had all been coded as "electioneering." *Id.* This fact was brought to Dr. Goldstein's attention by the *Buying Time* authors and, concluding that it was not "meaningfully distinguishable from the other CBM ads, . . . [he] recoded it as electioneering." *Id.* at 17. The second was a National Pro-Life Alliance advertisement (numbered 2107) which mentioned Wisconsin Senators Kohl and Feingold. Again, the *Buying Time* authors told Dr. Goldstein that the advertisement was "virtually identical" to another advertisement run in Virginia mentioning then-Senator Charles Robb. *Id.* Dr. Goldstein reviewed the storyboards of the two advertisements and found them "not meaningfully distinguishable, and resolved the inconsistency by re-coding [the commercial] as electioneering." *Id.* The final advertisement that was changed was sponsored by the Rhode Island Women Voters (numbered 1367). The advertisement was originally coded as a "genuine issue advertisement" but changed by Dr. Goldstein after the *Buying Time* authors disagreed with the coding. *Id.* Dr. Goldstein believes that the advertisement "is clearly electioneering." *Id.* As noted *infra*, Finding 356, Dr. Goldstein recently discovered that the six corresponding versions of Advertisement #1269 were originally coded as "genuine issue advertisements" by the students and later changed by the *Buying Time 2000* authors to "electioneering" commercials. Goldstein Dep. (Vol. 2) at 158-59 [JDT Vol. 8]. When these six advertisements are added to the analysis, which Dr. Goldstein terms "the most conservative standard estimate," one finds that 17 percent of the advertisements aired within 60 days of the election which identified a candidate were "genuine issue advertisements." *Id.* at 169. Defendants' experts personally disagree that all of these commercials are "genuine issue advertisements." *See* Holman Dep. at 82-83 (stating he considers Advertisement #1367 to be his "poster child of sham issue advocacy"); Goldstein Expert Report at 26 n.21 (noting that he considers all the

commercials with the exception of Advertisement # 2107 "were clearly intended to support or oppose the election of a candidate").

347. Dr. Gibson raises essentially the same concerns about Question 11 in *Buying Time 2000* as he does for the practically identical Question 6 in *Buying Time 1998*, discussed *supra*. Gibson Expert Report at 54-55. Dr. Goldstein states that "79.8 percent of the group-sponsored ads classified as electioneering were coded as having run within 60 days of the election, compared to only 18.7 percent of non-electioneering ads." *Id.* at 28. As one "would expect . . . that ads designed to promote or oppose a candidate would air relatively close to Election Day," this objective data, in Dr. Goldstein's opinion, corroborates the coding in Question 11 and demonstrates that Dr. Gibson's theory is incorrect. *Id.* at 28-29.

348. The NRA criticizes the *Buying Time 2000* study for not including two 30- minute "news magazines" in the data which it claims are "genuine issue advertisements." Proposed Findings of Fact of the NRA and the NRA PVF ¶ 9. "If these airings had been considered, 34% of the total volume of speech that BCRA in 2000 would have covered in the 60 days prior to the general election would have been genuine issue advertisements." *Id.* One of these "news magazines" was titled "California." LaPierre Decl. ¶ 12 [NRA App. at 5]. "California" was aired 800 times in California from August 29, 2002, to November 5, 2000. *Id.* ¶ 14. "During the entirety of the 30-minute program, there was only one fleeting reference to a federal candidate for office. Specifically, during a short segment urging viewers to join the NRA and describing the benefits of membership, a cover of an issue of the NRA's magazine 'First Freedom' depicting Vice President Gore's image, then a presidential candidate, flashed



on the screen for several seconds." *Id.* ¶ 13.[217] The NRA does not allege that the study included other 30 minute advertisements, or that the CMAG monitors such commercial broadcasts. It does not indicate how other 30 minute "news magazines" it ran during 2000 would have affected the results of *Buying Time*. *See* Proposed Findings of Fact of the NRA and the NRA PVF at ¶ ¶ 3-7.

*The Goldstein Expert Report*

349. Although Dr. Goldstein was involved in assembling the data sets used in both *Buying Time* studies, he did not participate in the writing of either *Buying Time* study or play a role in "selecting the conclusions that the authors of these reports chose to draw from the database," Goldstein Rebuttal Report at 3-4. His report, therefore, constitutes a separate assessment of the data collected for the *Buying Time* studies. The database he works from differs from that provided to the *Buying Time 2000* authors, as it has corrected omissions and errors discovered after *Buying Time 2000* was completed. *Id.* at 4-5. Dr. Goldstein's study produces nine principal conclusions.

350. *Scope of Political Advertising*. In the 2000 election cycle (from January 1, 2000, through election day), interest groups accounted for 16 percent of all political television advertisements at an estimated cost of $93 million.[218] Goldstein Expert Report at 8. Political parties accounted for

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[217] One other NRA 30 minute "news magazine" would similarly would be "captured" by BCRA due to the inclusion of the "First Freedom" cover. NRA App. 917, 920, 924, 929 ("It Can't Happen Here) (also referring once to the "Clinton-Gore assault weapons ban").

[218] Dr. Goldstein notes "[t]hese figures . . . underestimate television expenditures because CMAG estimates only cover markets serving 80 percent of the nation's population and make no attempt to measure the increased cost of advertising during the peak seasons of political campaigns when the demand for television advertising time pushes up spot prices." Goldstein Expert Report at 8.

27 percent of the political commercials at an estimated cost of $162 million, while candidates accounted for the remaining 52 percent of advertisements at an estimated cost of $338 million. *Id.* Compared to the 1998 campaign, the increase in interest group spending was the most dramatic, "rising from approximately $11 million in 1998 to an estimated $93 million in 2000." *Id.* at 9; *see also id.* at 10 (tbl. 1A-B) (showing the increase in candidate spending (from approximately $136.6 million to approximately $338.4 million) and in political party spending (from approximately $25.6 million to $162.3 million)). The majority of interest group advertising in 2000 was "not sponsored by PACs, and fell outside FECA regulation." *Id.* at 8. According to his figures, interest group PACs spent roughly $2 million on 3,688 political advertisements in federal races in 2000, while interest group non-PAC expenditures constituted $90 million spent on 129,647 commercials. *Id.* at 10 (tbl. 1B).

351. *The Role of Interest Groups and Political Parties in Political Television Advertising for the 2000 Presidential Campaign:* In terms of the presidential campaign, political parties purchased 41 percent of television advertisements aimed at the 2000 presidential race, while candidates accounted for 38 percent of the commercials, and interest groups eight percent. Goldstein Expert Report at 11 & n.11 (the remaining advertisements were coordinated expenditures). Interest group advertising in certain "battleground" states,[219] however, "rivaled that of the candidates or parties." *Id; see also id.* at 12 (tbl. 2). In House elections, interest group advertisements identifying a candidate and running in the last 60 days of the campaign accounted "for 17 percent of total House ad broadcasts during the 2000 election cycle," while parties provided 22 percent of advertisements in these

[219] Dr. Goldstein determined what states constituted "battleground states" "based on a professional review of various media sources," such as CNN.com. Goldstein Expert Report at 12 n.12.



races, and candidates 60.6 percent. *Id.* at 13. Dr. Goldstein finds that 99.8 percent of political party-financed television advertising mentioned or depicted a candidate, while only 1.8 percent of the ads "even mentioned the name of the party and many fewer promoted the candidate by virtue of his or her party affiliation." *Id.*[220]

352. *The BCRA Universe of Interest Group Electioneering:* Dr. Goldstein finds that 35 interest groups broadcast commercials on television during the last 60 days of the 2000 election that mentioned a candidate. Goldstein Expert Report at 13. These electioneering advertisements were aired 59,632 times at an estimated cost of approximately $40.5 million. *Id.* at 14; *see also id.* at 14-15 (tbl. 3).[221] The top ten of these groups accounted for 87 percent of these expenditures. *Id.* at 13.

353. *The "Magic Words" Test:* The so-called "magic words" test derives from *Buckley's* legal standard for determining whether an advertisement is designed to persuade citizens to vote for or against a particular candidate. Such advertisements were termed characterized "express advocacy" by the Supreme Court, and defined as containing words such as "elect," "defeat" or "support." *See supra* Finding ¶ 272 n.57. Dr. Goldstein finds that 11.4 percent of the 433,811 advertisements aired by candidates met the express advocacy test. Goldstein Expert Report at 16. Conversely, 88.6 percent of candidate advertisements in 2000 "were technically undetected by the *Buckley* magic words test." *Id.* This result demonstrates to Dr. Goldstein "that magic words are not an effective way of distinguishing between political ads that

[220] This assessment does not include the "tag lines" included in most advertisements identifying the commercial's sponsor that can include the party's name. Goldstein Expert Report at 13 n.14.

[221] This result only reflects the 80 percent of households covered by CMAG, and according to Dr. Goldstein "[n]o comprehensive information is available for the balance of the markets or for ads airing on local cable stations."

have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue." *Id.*

354. *Temporal Distribution of Interest Group-Financed Television Advertisements Which Mention a Candidate:* Dr. Goldstein determines that the "CMAG database provides empirical evidence of a strong positive correlation between [advertisements' reference to a candidate and the proximity in time of their broadcast to the election] and consequently of their validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office." Goldstein Expert Report at 17. He finds that interest group advertisements that "mention or depict a candidate tend to be broadcast within 60 days of the election," while those which do not "tend to be spread more evenly over the year." *Id.* In addition, Dr. Goldstein also finds the distribution of those advertisements mentioning candidates for federal office to be "closely correlated to the distribution of electioneering communications broadcast by candidates and political parties." *Id.*

355. *Geographic Distribution of Interest Group-Sponsored Advertisements Which Mention a Candidate and are Aired within 60 Days of an Election:* Dr. Goldstein finds that interest group advertisements that mentioned a candidate and were broadcast within 60 days of the 2000 election "were highly concentrated in states and congressional districts with competitive races." Goldstein Expert Report at 20. For Senate races, 89.2 percent of these commercials ran in competitive races. *Id.* Political parties concentrated 90.6 percent of their ads in the competitive states. *Id.* at 21. House races demonstrated the same pattern, with 85.3 percent of interest group "electioneering" advertisements, and 98.2 percent of political party "electioneering" advertisements broadcast in competitive districts. *Id.* at 21.



356. *Coders' Perceptions of Interest Group Television Advertisements:* Dr. Goldstein had students code each interest group political television advertisement aired in the 2000 campaign. They could code the commercials' purpose as either to "'generate support or opposition for candidate,' or to 'provide information or urge action,'" and "were also given the option of 'unsure/unclear.'" Goldstein Expert Report at 24 & n.20. The coders found 97.7 percent of the 60,623 interest group sponsored television advertisements that mentioned a candidate and were broadcast within 60 days of an election as "electioneering," or supporting or opposing a candidate. *Id; see also id.* at 25 (Tbl. 7). Dr. Goldstein finds this result particularly persuasive given the fact that the students coded one-third of all interest group television advertisements run over the course of the 2000 campaign to be genuine issue advertisements. *Id.*

357. Of the 45,001 advertisements deemed to be "genuine issue advertisements" by the coders, 3.1 percent would have been covered by BCRA in that they were run within 60 days of the election and identified a candidate. Goldstein Expert Report at 27.[222] Dr. Goldstein acknowledges that in *Buying Time 2000* and an article he co-authored with Dr. Jonathan Krasno fewer than six advertisements were said to be unfairly captured by BCRA. *Id.* at 26 n.21. In those other publications, "certain of these six ads-particularly those as to which there was disagreement among the student coders-were ultimately treated as electioneering. In fact, [Dr. Goldstein's] own judgment is that five of these six ads were clearly intended to support or oppose the election of a candidate . . . . However, in this report, [Dr. Goldstein] chose[] to take the most

[222] Dr. Goldstein contends that this "percentage overstates the proportion of all Genuine Issue Ads covered by BCRA, because it does not take into account the unregulated ads run in non-election years during a single Congressional Term, such as 1999." Goldstein Expert Report at 27 n.22.

conservative approach and count all six as Genuine Issue Ads." *Id.* However, Dr. Goldstein now acknowledges that a "most conservative" estimate would include 6 more advertisements listed in footnote 8 of his Rebuttal Report. Goldstein Dep. (Vol. 2) at 160 [JDT Vol. 8]. Adding these six advertisements results in the finding that 17 percent of the advertisements run during the last 60 days of the 2000 campaign which identified candidates were genuine issue advertisements. *Id.* at 169; *see also* Finding 354 *supra*. Dr. Gibson objects to Dr. Goldstein's reliance "on the highly subjective coding" of the student coders to determine the purpose of the issue advertisements (i.e., to promote a candidate or to urge action on an issue). Gibson Rebuttal Report at 20; *see also* Holman Dep. at 73 (noting that the question asks for a subjective assessment).

358. *The Effectiveness of Broadcasting Issue Ads Close to an Election:* Dr. Goldstein's final finding is that if an interest group is genuinely interested in promoting an issue, the least desireable time to air such an advertisement is in the final 60 days of an electoral campaign. Goldstein Expert Report at 32. This finding runs counter to Plaintiffs' argument that BCRA "may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics." *Id.* Dr. Goldstein first comments that "while there is evidence that interest in politics and *elections* rises as Election Day approaches, there is absolutely no evidence to support the position that interest in *public policy* issues rises as well during that time." *Id.* (emphasis in original).[223] Dr. Goldstein

[223] *But see* Finding 358, *infra*. Edward Monroe, Director of Political Affairs for the Associated Builders and Contractors, testified that "members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near . . . ." Monroe Decl. ¶ ¶ 18-19. Paul R. Huard, Senior Vice President for Finance and Administration of the National Association of Manufacturers ("NAM") testified that "[i]n broad terms . . . Americans tend to have



notes that since the last two months of an election campaign is when most political advertisements are aired (64.2 percent of all political advertisements run in 2000 were run in the campaign's final 60 days), "an individual interest group's message on a public policy issue is likely to become lost" if aired during that period. *Id.* Dr. Goldstein also posits that "partisan attachments . . . harden during the last two months of a campaign" which makes it "more difficult to persuade otherwise open-minded viewers of the merits of an interest group's policy stance." *Id.* at 32-33 (citing John Zaller, Nature and Origins of Mass Opinion (1992)). According to Dr. Goldstein's Expert Report, in 2000, 17.7 percent of such advertisements were aired in the final 60 days of the election campaign, slightly more than the 16.4 percent "which would have run if the ads had been equally distributed throughout the year." *Id.* at 33; *see also id.* at 31 (tbl. 9). In contrast, during the months of April through June 2000, 45 percent of such issue advertisements were aired, "as against an expected 25 percent if the ads were spread evenly throughout the year." *Id.* Dr. Goldstein believes this concentration is "a likely result of groups turning on the heat to pass or defeat bills before Congress adjourned for the summer." *Id.* Dr. Gibson is critical of Dr. Goldstein's finding. Gibson Rebuttal Report at 26. According to Dr. Gibson, political psychologists, like William McGuire (whose work Dr. Goldstein cites), have concluded "that to persuade someone involves two steps. First, one must get the attention of the person one is attempting to persuade. Second, one must overcome the strength of existing attitudes if the attempt at persuasive communication is to result in attitude change." *Id.* Given that "those with strong attitudes tend to pay attention to political communications while those with weak political attitudes tend to ignore them . . . . [t]hose most easily reached are least

greater interest in political matters as an election approaches." Huard Decl. ¶ 10.

easily changed; those most easily changed are those most difficult to reach." *Id.* Since those with "weak attitudes" tend to pay attention during "the most extreme circumstances," the period leading up to the election provides the window in which to communication with these difficult to reach, but easily persuaded individuals. *Id.* at 27. Dr. Gibson also rejects the argument that issue advertising close to an election is unproductive because partisan allegiances harden as elections approach. *Id.* He states that this line of reasoning leads to the strange conclusion that "candidates should abandon advertising as the election approaches since these hardened attitudes are difficult to convert." *Id.* Dr. Gibson points out that "that does not happen, since, as the election approaches, candidates try to reach an even greater percentage of marginal voters, who have little interest in politics, and relatively pliable issue views." *Id.*

*Genuine Issue Advertisements About Legislation and Public Policy Issues Are Run During the Sixty Days Before A Federal Election Notwithstanding the Competition for Air Time With Candidate-Centered Advertisements*

359. Notwithstanding the disadvantages of running genuine issue advertisements during the 60 day period leading up to a general election,[224] plaintiffs have demonstrated that it can be

[224] Some political consultants believe there is limited utility in running a genuine issue advertisement in the 60 days before a federal election. *See* Strother Decl. ¶ 7 [DEV 9-Tab 40]. ("[T]hese issue advertisements were run when there were no pending elections. For these true issue ads, we specifically avoided the months right before the election because (a) air time would be more expensive; and (b) each ad would just become part of the election season gumbo and viewers would assume that it was just another election-related ad."); Strother Cross Exam. at 70-71; Bailey Decl. ¶ 12 [DEV 6-Tab 2]. Dr. Goldstein also believes that it is ineffective to run genuine issue advertisements in the weeks leading up to an election. "Running genuine issue ads near an election does not increase the effectiveness of those ads; in fact, it is likely that the ads' effectiveness actually decreases . . . . In addition to being less effective at conveying



effective and necessary for them to run legislation-centered advertisements in the weeks before an election. Monroe Decl. ¶¶ 18-19 [10 PCS] ("The defendants in this proceeding have argued that ads run near the time of an election are evidence that the association's actual intent is to advocate the election of one candidate or another. However, there are other, more valid, explanations for the timing of our advertising. One is that serious legislative initiatives or regulatory proposals often are considered near the time of elections. Also, it is also clear that members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near. If that is the time when people will listen, that is the time to speak. And once an election occurs, there seems to be a period of fatigue during which political matters are of less interest, making issue ads then less effective."); Huard Decl. ¶ 10 [10 PCS] ("NAM has run issue ads at times when no election was impending. In broad terms, however, Americans tend to have greater interest in political matters as an election approaches. At the same time, elected officials are most attuned to the views of their constituents in the pre- election period. Thus, for many purposes, the pre-election season is a critical time for issue ads. Conversely, after an election public interest in public policy matters fades, perhaps due to fatigue. Then, few issue ads are run soon after an election."); Murphy Decl. ¶ 12 [3 PCS] ("Finally, it is important to emphasize that the blackout periods imposed by the BCRA—60 days before a general election and 30 days

their messages, issue ads run close to an election are also less cost-effective, since the price of scarce television and radio air time is higher near an election than during the rest of the year." Goldstein Expert Report at 32-33 [DEV 3-Tab 7]; Magleby Expert Report at 20 [DEV 4-Tab 8] ("In contrast, genuine issue ads are more likely to run earlier since rates are cheaper and proximity to an election is less important."); Krasno & Sorauf Expert Report at 57 [DEV 1-Tab 2] ("Pure issue ads are more likely to respond to the congressional calendar or an advertising strategy unrelated to an election.").

before a primary—are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives. Some of the President's or Attorney General's boldest initiatives are advanced during election years-often within 60 days of a general election. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period."). Plaintiffs' expert Dr. Gibson agrees that running issue advertisements in proximity to federal elections is effective. *See* Finding 357, *supra*.

360. The legislative calendar can necessitate the running of issue advertisements during the final days of an election campaign. Edward Monroe states that "serious legislative initiatives or regulatory proposals often are considered near the time of elections," without providing actual examples of advertisements run in response to the legislative activity. Monroe Decl. ¶ 18 [10 PCS]; *see also* Huard Decl. ¶ 11 [10 PCS] ("[I]ssue ads supporting a particular tax bill may well be needed as the bill approaches a vote. If it happens that primaries or elections are imminent, that does not diminish the need to be able to speak out right then."); Murphy Decl. ¶ 12 [3 PCS] (commenting that "the blackout periods imposed by the BCRA ... are often periods of intense legislative activity," noting consideration of the Homeland Security Department bill occurred within 60 days of the 2002 election, but listing activities that would notbe affected by BCRA). Some deponents provide concrete examples of merging electoral and legislative calendars and their actions during those periods. The AFL-CIO aired advertisements regarding an "upcoming budget fight over education programs" in September 1996. Mitchell Decl. ¶ 41 & Exhibit 59 ("No Two Way"). The labor group ran another "genuine" issue advertisement between September 21 and 25, 1998, in



eight congressional districts opposing "fast track" trade legislation which was scheduled for a vote in the House of Representatives on September 25, 1998. Mitchell Decl. ¶ 52 & Exhibit 116 ("Barker"). During the same month, the AFL-CIO ran a legislation-centered advertisements aimed at a scheduled Senate vote on HMO legislation that the AFL-CIO considered to be inadequate, *id*. ¶ 51 & Exhibits 105-07 ("Deny"),[225] and opposing the Taxpayer Relief Act which had been recently marked up by the House Ways and Means Committee, Mitchell Decl. ¶ 52 & Exhibits 108-09 [PCS 6] ("Spearmint" and "Spear"); Shea Decl. ¶ 43 [PCS 7]. In 2002, the GOA ran a radio advertisement in New Hampshire within 30 days of the primary election for the New Hampshire Republican U.S. Senate nominee, which supported legislation allowing airline pilots to be armed. Pratt Decl. ¶ 5. *See also* Mann Cross Exam. at 176 (explaining that a flurry of legislative activity occurs near the end of a congressional session, therefore, often within the 60 day period preceding a general election).

361. The ACLU seeks to influence how members vote on pending legislation by educating the public about its concerns and using the public to communicate their concerns to their elected representatives. Murphy Decl. ¶ 8 [3 PCS/ACLU 9] ("Inevitably, many of the ACLU's statements involving legislation or executive branch policies, including print and broadcast communications, refer to a clearly identified candidate, member or executive branch official."). The ACLU cites as an example an advertising campaign directed at Speaker Dennis Hastert, who represents the fourteenth district of Illinois, in March of 2002 urging him to bring the Employment Non-Discrimination Act ("ENDA") to a full vote in the House. *Id*. ¶ 10; *see also* Text of Advertisement, 3

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[225] According to Defendants, "Deny" continued to run "well after the legislative action the ad was supposedly timed to influence." Gov't Opp'n Br. at 93. The AFL-CIO denies this point. AFL-CIO Reply Br. at 6 n.6.

PCS/ACLU 14-17. The ad was broadcast on multiple Chicago and Aurora, Illinois radio stations throughout the weekend of March 15-March 17, 2002. *Id.* Since the advertisement was run within thirty days of a primary election, the commercial would have constituted an electioneering communication under BCRA and would have violated BCRA because it was paid for with the general treasury funds of a corporation. *Id.* (observing that the "ACLU also hoped to highlight the constitutional flaws of BCRA").

362. The text of the Hastert ad is as follows:

> Sound Effect: Long Tympani/Drum Roll
>
> Male announcer—Master of Ceremonies (during sound effect): *And now . . .*
>
> Sound Effect: Drum Roll Ends with Cymbal Crash
>
> Sound Effect: *2 Seconds of Silence*
>
> Male Announcer: . . . . *We're waiting.*
>
> Sound Effect: Long Tympani/Drum Roll Starts Again
>
> Sound Effect: Drum Roll Ends with Cymbal Crash
>
> Sound Effect: *2 Seconds of Silence*
>
> Male Announcer: . . . . *Still waiting.*
>
> Female Announcer: *Waiting for our Congressman,* (Sound Effect Music Up—Pop Goes the Weasel or Circus Music) *Dennis Hastert, to protect everyone from discrimination on the job.*
>
> *As speaker of the House, Representative Hastert has the power to stop the delays and bring the Employment Non-Discrimination Act—ENDA—up for a vote in Congress. It's about fairness. It's time to ensure equal rights for all who work, including lesbians and gay men, and make sure that it's the quality of our work that counts, and nothing else.* (Music Out.)



> Male Announcer: *So Congressman Hastert*
>
> Sound Effect: Tympani/Drum Roll
>
> Male Announcer—Master of Ceremonies (during sound effect): *What will it be?*
>
> Sound effect: Drum Roll Ends with Cymbal Crash
>
> Male Announcer: *Protecting Workers from discrimination, or more delays?*
>
> Female Announcer: Take action now. Send Speaker Hastert a letter urging him to support fairness and bring ENDA to the floor by going to www.aclu.org/enda.
>
> Male Announcer: Paid for by the American Civil Liberties Union.
>
> Murphy Decl. Exhibit 15 (script of ACLU radio ad, "ENDA Delays").

363. The ACLU's purpose in running the advertisement was to create a commercial that would violate BCRA and thereby provide standing to challenge the constitutionality of the Act. A March 10, 2002, e-mail from Laura Murphy, legislative director of the ACLU, to colleagues explained why the ACLU's March 2002 Hastert ad was run:

> Anthony wants the ACLU to be in a position to challenge Shays-Meehan when it becomes law as early as during the Easter recess. As you know the issue advocacy restrictions would select groups like the ACLU if we want to take out and [sic] ad 30 days before a primary or 60 days before a general election in broadcast, satellite or cable outlets. These ads would have to reach 50,000 people or more and would have to mention the name of a candidate. *Steve thinks that the ads that we ran during the 2000 election cycle would not qualify to give us clear standing to challenge the law.*

Email Message Attached as Exhibit to Resps. of American Civil Liberties Union to Defendant's Second Set of Requests

for Production of Documents, Exhibit B; USA-ACLU-00003 [DEV 130-Tab 4] (italics added).

364. The ACLU asserts that it does not engage in any federal election activity as defined by the FECA. A. Romero Decl. ¶ 3, 3 PCS/ACLU 2. The ACLU likewise asserts that it has never taken a position in a partisan political election in its 82-year history. A. Romero Decl. ¶ 3, 3 PCS/ACLU 2.

365. Krasno and Sorauf comment on the ACLU's Hastert advertisement:

> [T]he ACLU has demonstrated with a commercial about gay rights, aired in House Speaker Dennis Hastert's district last spring before the GOP primary, that it is possible to deliberately create a pure issue ad that runs afoul of BCRA.

Krasno & Sorauf Expert Report at 62 [DEV 1-Tab 2]; *see also* Text of ads, 3 PCS/ACLU 16-17 (noting script of advertisement that the ACLU ran in the print media over this issue).

366. The AFL-CIO's broadcast advertising campaigns were focused, in part, on issues of importance to AFL-CIO members. In her testimony, Denise Mitchell,[226] Special

[226] Denise Mitchell was appointed to the position of Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney on November 1, 1995, shortly after Sweeney was elected President of the AFL-CIO. Mitchell Decl. ¶ 1 [6 PCS]. Prior to assuming this position, Mitchell had worked with Sweeney in a similar role for a number of years when he was President of the Service Employees International Union and she had assisted in his campaign for election to the position of AFL-CIO President. *Id.* Mitchell has worked in marketing and media relations for unions and other nonprofit organizations on working family issues for more than 20 years. *Id.* In her current position, Mitchell has the primary responsibility for overseeing all public relations activities of the AFL-CIO including all AFL-CIO use of broadcast and print media. *Id* . ¶ 2. Mitchell is responsible for making the operational decisions as to both the substance and the method of communication of the AFL-CIO's message



Assistant for Public Affairs to AFL-CIO President John J. Sweeney, explains how the AFL-CIO selected the particular issues discussed in the advertisements:

> In both election and non-election years, my goal in selecting the issues to be addressed in the AFL-CIO's broadcast advertising has been to focus attention on a series of national policy issues of importance to working families. I have been guided in selecting these issues by input from the Executive Council of the AFL-CIO, which regularly discusses and focuses on a legislative and policy agenda for the organization, the AFL-CIO's ongoing lobbying program, polling and other opinion research, conducted primarily by the Washington, D.C, firm of Peter Hart Associates, and the views of affiliated unions. Most of the issues addressed in our advertisements, such as budget priorities, tax fairness, Medicare, and health care, recur in virtually every session of Congress; others, such as fast-track trade legislation or the trade status of China, may be current for a period of years and then become inactive for awhile.

Mitchell Decl. ¶ 10 [6 PCS]; *see also id.* ¶ 70 [6 PCS] ("[The indirect effect on election outcomes] has never been the point of our broadcast advertising program, within or outside the 30-and 60-day periods.").

367. Plaintiff AFL-CIO has provided a number of examples of "genuine issue advertisements" which relate to pending legislation that BCRA would capture because the commercials ran on television and radio within 30 days of a primary election. AFL-CIO Opening Br. at 10-11 (citing Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59). The

to union members and to the general public. *Id.* Mitchell makes the strategic and logistical decisions regarding the AFL-CIO's media buys, and, within policy guidelines, makes the editorial decisions regarding the content of the AFL-CIO's communications.

advertisements cited to by the AFL-CIO ran in "flights," aimed at particular legislation pending at the time. Practically all of these flights consisted of a variety of "cookie-cutter" advertisements, meaning advertisements that are virtually identical except that they reference different candidates. *See generally* Mitchell Decl. Exhibit 1. Ms. Mitchell describes advertising campaigns comprising 29 different sets of cookie-cutter advertisements, some of which were run within 30 days of a named candidate's primary election. Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59.[227] In addition, Exhibit 1 shows that four more advertisements would have been captured by BCRA due to their airing within 30 days of the identified candidate's primary, but since all of the airings of three of these commercials would have been captured by BCRA's 60 day-window as well.[228]

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[227] The advertisements are: "Too Far," Mitchell Decl. ¶ 32 & Exhibit 31; "1991," *id.* ¶ 34 & Exhibit 33; "Raise," *id.* ¶ 35 & Exhibit 35; "Votes," *id.* ¶ 35 & Exhibit 36; "People," *id.* ¶ 35 & Exhibit 38; "No," *id.* ¶ 35 & Exhibit 39; "Minimum Wage," *id.* ¶ 36 & Exhibit 42; "$5.15," *id.* ¶ 36 & Exhibit 44; "Couple," *id.* ¶ 37 & Exhibit 47; "Lady," *id.* ¶ 37 & Exhibit 48; "Peace," *id.* ¶ 37 & Exhibit 49; "Whither," *id.* ¶ 37 & Exhibit 50; "Another," *id.* ¶ 38 & Exhibit 53; "Edith," *id.* ¶ 40 & Exhibit 58; "Pass," *id.* ¶ 50 & Exhibit 94; "Support," *id.* ¶ 50 & Exhibit 95; "Call," *id.* ¶ 50 & Exhibit 98; "Failed," *id.* ¶ 50 & Exhibit 99; "Liable," *id.* ¶ 50 & Exhibit 100; "Soon," *id.* ¶ 50 & Exhibit 100; "Basic," *id.* ¶ 50 & Exhibit 102; "Label," *id.* ¶ 57 & Exhibit 127; "Trust," *id.* ¶ 57 & Exhibit 128; "Endure," *id.* ¶ 57 & Exhibit 129; "Stand," *id.* ¶ 57 & Exhibit 130; "Block," *id.* ¶ 58 & Exhibit 137; "Help," *id.* ¶ 58 & Exhibit 138; "Sky," *id.* ¶ 59 & Exhibit 139; and "Protect," *id.* ¶ 59 & Exhibit 140.

[228] These four advertisements are: "Job," Mitchell Decl. ¶ 61 & Exhibits 1 (at 102), 141 (All airings of "Job" took place within 60 days of the 2000 general election); "Barker," *id.* ¶ 53 & Exhibit 116 (All airings of "Barker" took place within 60 days of the 2000 general election); "No Two Way," *id.* ¶ 41 & Exhibit 59 (All airings of "Job" took place within 60 days of the 2000 general election); and "Raiders," *id.* Exhibit 1 at 36, 38-39, Exhibit 58 at 10. "Job," "Barker," and "No Two Way" were captured by BCRA's 60-day window.



*Representative Examples of Genuine Issue Advertisements Aired Within 30 Days of a Primary Election, or 60 Days of a General Election, and Mentioning the Name of a Federal Candidate*

368. The AFL-CIO aired a radio advertisement entitled "Barker" within 60 days of the 1998 general elections.[229] Mitchell Decl. Exhibit 1 at 86. The advertisement urged the candidates to Fast Track trade legislation, and only mentions that candidate's name with respect to asking the viewer to tell the candidate to "vote no on Fast Track." The following is the audio of the ad:

> Paid for by the Working Men and Women of the AFL-CIO. [Barker speaking]: Okay ladies and gents, step right up and see if you can follow the ball. Is it here? Is it there? Where could it be? [Voice over]: They're playing games again in Washington. Without discussion or debate, they're planning another vote on the controversial Fast Track law—special powers to ram through trade deals like NAFTA. Fast Track failed *last* year because working families don't want more trade deals that put big corporations first; deals that ignore our concerns about lost jobs; environmental problems on our borders, and dangerous, imported foods. But Newt Gingrich and the sponsors of Fast Track hope they can sneak it by this fall, while public attention is focused on other issues. [Barker speaking]: Keep your eyes on the ball now . . . [Voice over]: Call Representative _____ at xxx-xxx-xxxx and tell him to vote *no* on Fast Track.

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[229] "Barker" aired in the districts of Congressman Chris John (LA- 07); Congressman Scott Klug (WI-02); Congresswoman Jo Ann Emerson (MO-08); Congresswoman Anne Northup (KY-03); Congressman Jack Kingston (GA-01); and Congressman Rick White (WA-01). Mitchell Decl. Exhibit 1 at 86.

> Tell him we're still paying attention. And Fast Track is *still* a bad idea.

Mitchell Decl. Exhibit 116. Defense Expert Magleby, examined "Barker" during his cross examination and stated that he would rate it as a "genuine" issue ad. Magleby Cross Exam. at 108-109. Even though "Barker" mentioned the name of a candidate, Magleby determined that it was a genuine issue advertisement because it "doesn't mention how [the candidate] voted. It doesn't represent what [the candidate] has said about the issue. The body of the ad has no referent to [the candidate] whatsoever. The only referent to [the candidate] is the call line." Magleby Cross Exam. at 103-105; *see also id.* at 106 (explaining that "a generic call your Congressman, call your Senator, when then linked to a legislation and call your Congressman or Senator about this legislation without a referent to their position on the issue, seems to me substantively different than when they are mentioned in view of what their position is on that issue. Q. When you say substantively different, are you referring to a difference with respect to whether the advertisement communicates an electioneering message? A. Yes.").

369. The AFL-CIO paid for the following television advertisement, entitled, "Call." "Call" aired within 30 days of the 1998 primary elections of Congressman Jim Tanner (TN-08) and Senator Kit Bond (MO). The ad urged the candidates to support the Patient Bill of Rights Act.[230] *See* Mitchell Exhibit 1 at 80. The following is the text of the advertisement:

> Nurse at nursing station, direct-to-camera: I love nursing. But it's so much harder that it's ever been.

[230] According to Ms. Mitchell, "Call" was one of "several flights of television and radio advertisements designed to generate support for HMO reform legislation" that were sponsored by the AFL-CIO. Mitchell Decl. ¶ 50. Seventeen versions of "Call" were broadcast, two of which named federal candidates within 30 days of their primary. *Id.* Exhibit 1 at 80-82.



> These bureaucrats from the insurance companies. They routinely deny care, and they make decisions that only the doctors should be making." Today the insurance industry is spending millions to block a law in Congress that would protect our rights—and our lives—in the new world of HMOs and managed care. Call Congresswoman Chenowith. Tell her to stand up for us and support the Patient Bill of Rights Act. "If Congress would just do their job . . . then I can do mine."

Mitchell Exhibit 99 (while the script of "Call" produced by the AFL-CIO mentions Congresswoman Chenowith's name, a version of "Call" was broadcast on July 15-21, 1998, but using Congressman Tanner's name and Senator Bond's name).

370. The AFL-CIO paid for the following television advertisement, entitled, "Deny." "Deny" aired within 60 days of the 1998 general elections of Senator Kit Bond (MO), Senator Charles Grassley (IA), the late Senator Paul Coverdell (GA), and Senator Lauch Faircloth (NC). Mitchell Decl. Exhibit 1 at 83-84. The advertisement urges the candidates to oppose S, 2330, a patients' rights bill, and only mentioned that candidate's name with respect to asking the viewer to tell the candidate to vote "no" on the legislation. The following is the audio of the ad:

> A young cancer victim needs an outside specialist . . . But the HMO says no. A man with chest pains goes to the nearest emergency room . . . But his HMO won't pay. An elderly patient needs more hospital time . . . But her doctors are over- ruled [*sic*] by bureaucrats. Still, Republicans in Washington are pushing an empty HMO proposal that won't stop these abuses. Tell Senator ___ to vote no on S. 2330 . . . . .. and demand a real patient protection law. [Chyron showing 1-800 number for viewers to call].

Mitchell Decl. Exhibit 105.

371. The AFL-CIO paid for the following television advertisement, entitled, "Spearmint." "Spearmint" aired within 60 days of the 1998 general elections of the following Members of Congress: Congressman Rick White (WA-01); Congressman Jim Leach (IA-01); Congressman Jim Nussle (IA-02); Congresswoman Anne Northup (KY-03); Congressman Jim Bunning (KY-04); Congressman Mike Parker (MS-04); Congressman Virgil Goode (VA-05); Congressman Scott Klug (WI-02); Congressman Steve Chabot (OH-01). Mitchell Decl. Exhibit 1 at 84-85. The advertisement urged the candidates to oppose tax cuts and to protect Social Security, and only mentioned that candidate's name with respect to asking the viewer to tell the candidate to "vote no on this tax scheme." The following is the audio of the ad:

> After years of deficits, the politicians in Washington say we're *rolling* in money. But here's something they're *not* saying. Virtually every dollar of the budget surplus comes from Social Security. Now the Republican Congress wants to spend this Social Security surplus on an eighty billion dollar election-year tax cut . . . . . even as there's talk about cutting Social Security for future retirees. Call Congressman _____, and tell him to vote no on this tax scheme. Tell _____ to put Social Security first!

Mitchell Decl. Exhibit 108.[231]

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[231] The AFL-CIO aired another advertisement entitled "Spear" that was virtually identical to "Spearmint." "Spear" aired within 60 days of the 1998 general elections of the following Members of Congress: Congressman Robert Aderholt (AL-04); Congressman Mike Crapo (ID-02); Congresswoman Helen Chenoweth (ID-01); and Congressman John Ensign (NV-01); Congressman Mark Neumann (WI-01). Mitchell Decl. Exhibit 1 at 85-86. Like "Spearmint," "Spear" urged the candidate to protect Social Security, and only mentioned the candidate's name with respect to asking the viewer to tell the candidate to "vote no on this election-year tax scheme." Mitchell Decl. Exhibit 109.



372. The AFL-CIO paid for the following television ad, entitled, "Label." "Label" aired within 30 days of the 2000 primary elections of the following Members of Congress: Congressman Silvestre Reyes (TX-16) and Congressman Ron Paul (TX-14). Mitchell Decl. Exhibit 1 at 92. The ad urged the candidates to oppose a trade bill to benefit China.[232] The following is the audio of the ad:

> Behind this label is a shameful story. Of millions herded into forced labor camps, and average working wages of just thirteen cents an hour. Of a nation that routinely violates trade agreements; flooding our markets with low-wage imports; undercutting American jobs. Yet know Congress is poised to reward China with permanent free trade status, instead of a one-year deal. Call Congressman _____, and tell him to keep China on probation. Until this label stands for fairness.

Mitchell Decl. Exhibit 127.[233]

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[232] "Label," as well as the advertisements entitled "Trust" and "Endure," *see infra* n.233, were run in February through June 2002 as part of "several flights of ads . . . in opposition to President Clinton's proposal to provide permanent normal trade relations to China." Mitchell Decl. ¶ 57. AFL-CIO ran 14 versions of "Label," two within 30 days of a named candidate's primary. *Id.* Exhibit 1 at 92-93.

[233] The AFL-CIO also aired two other advertisements that were similar to "Label": "Trust" and "Endure." Sixteen versions of "Trust" were aired, two within 30 days of the 2000 primary elections of Congressman Steve Buyer (IN-05) and Congresswoman Eva Clayton (NC-01). Mitchell Decl. Exhibit 1 at 94-97. "Trust," like "Label," urged the candidates to oppose the China trade bill, and only mentioned the candidate's name with respect to asking the viewer to tell the candidate to "keep China on probation." Mitchell Decl. Exhibit 128. "Endure" also aired within 30 days of the 2000 primary elections of Members of Congress (Congressman Edward Whitfield (KY- 01), Congressman Steve Buyer (IN-05), and Congresswoman Eva Clayton (NC- 01)), and urged candidates to oppose a trade deal for China. Mitchell Decl. Exhibit 129.

373. The AFL-CIO paid for the following television advertisement, entitled, "Endure." "Endure" aired within 30 days of the primary elections of the following Members of Congress: Congressman Edward Whitfield (KY-01); Congressman Steve Buyer (IN-05); and Congresswoman Eva Clayton (NC-01). Mitchell Decl. Exhibit 1 at 95-96. The advertisement urged the candidate to oppose a trade deal for China. The following is the audio of the ad:

> "I voiced my opinion that China ought to protect worker's rights, people ought to have human rights . . . . For that, I spent 18 years in prison and was very nearly executed." Wei Jingsheng endured years of torture for challenging a brutal system of slave wages and sweat shops, through which Chinese workers are exploited, and Americans lose jobs. But instead of pressuring China to stop these practices, Congress is set to scrap its annual review of China's record, and reward Beijing with a permanent trade deal,,, a permanent trade deal though China's broken every trade pact it's signed with the U.S. for the past decade. "If you give China permanent trade status, and don't talk about it once a year, every year, and evaluate how they treat the Chinese people, they'll feel they can do whatever they want, however they want. This will be incredibly detrimental to human rights in China." Tell your member of Congress to keep China on probation . . . until China earns our trust. [Text on screen reads: Call Your Member of Congress 800-378-1844].

Mitchell Decl. Exhibit 129.

*Representative Examples of Candidate-Centered Issue Advertisements Aired Within 30 Days of a Primary Election or 60 Days of a General Election*

374. The AFL-CIO paid for the following radio advertisement entitled "No Two Way," which aired in 35 congressional districts within 60 days of the 1996 general election. Mitchell Decl. ¶ 41. "No Two Way" targeted those



candidates who, as Members of Congress, had voted "to cut the college loan program in October, 1995." *Id.*

> CAROLYN: My husband and I both work. And next year, we'll have two children in college. And it will be very hard to put them through, even with the two incomes. [Announcer]: Working families are struggling. But Congresswoman Andrea Seastrand voted with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy. She even voted to eliminate the Department of Education. Congress will vote again on the budget. Tell Seastrand, don't write off our children's future. CAROLYN: Tell her, her priorities are all wrong.

Mitchell Decl. Exhibit 114.

375. The AFL-CIO paid for the following television advertisement entitled "Retire," which aired within 60 days of the 1996 general election. Mitchell Decl. ¶ 42. "Retire" was one of the "'electronic voter guide []'" advertisements run by the AFL-CIO "beginning in late September and continuing until the November election." *Id.*

> What's important to America's families? [middle-aged man, interview style]: "My pension is very important because it will provide a significant amount of my income when I retire." And where do the candidates stand? Congressman Charlie Bass voted to make it easier for corporations to raid employee pension funds. Arnie Arnesen opposes that plan. She supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.

Mitchell Decl. Exhibit 63.

376. The AFL-CIO paid for the following television advertisement entitled "Job," which aired in fourteen congressional districts within 60 days of the 2000 general election. Mitchell Decl. ¶ 61 and Exhibit 1 at 101-102. The

advertisement targeted Members of Congress who had voted "to prevent an important OSHA regulation intended to prevent repetitive motion injuries from being implemented." *Id.* at ¶ 61. The regulation was part of the Departments of Labor and Health and Human Services budget bill, which President Clinton had threatened to veto if it included a rider removing the OSHA regulation. *Id.* Initially, the House leadership had agreed to a compromise, but then "backed out in October 2000." *Id.*

> [Machine operator]: "Well when you're lifting 70 thousand pounds of castings a day and you do this for 24 years, you're gonna hurt yourself. I had surgery on both hands but I'll be in pain the rest of my life." Every year, tens of thousands of Americans suffer permanent and crippling repetitive motion injuries on the job. Yet Congressman _____ voted to block federal safety standards that would help protect workers from this risk. Tell _____ his/her politics causes pain. [Machine operator]: "We're all human beings we need to help each other so that this stuff doesn't happen to us."

Mitchell Decl. Exhibit 141.

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## VI. CONCLUSION

For the reasons set forth in my opinion, with regard to Title I of BCRA, I find constitutional: new FECA Section 323(a) only to the extent that it bans national parties from using nonfederal funds for Section 301(20)(A)(iii) activities; new FECA Section 323(b) as applied to Section 301(20)(A)(iii) only; new FECA Section 323(e) except to the extent that it prevents federal candidates from soliciting funds for their national parties; and new FECA Section 323(f). I find unconstitutional: new FECA Section 323(a) except to the extent it bans national parties from using nonfederal funds for Section 301(20)(A)(iii) activities; Section 323(b) as applied



to Sections 301(20)(A)(i), (ii), and (iv); new FECA Section 323(d); and new FECA Section 323(e) to the extent that it prevents federal candidates from soliciting funds for their national parties. With regard to Title II, for the reasons set forth in my opinion, I find constitutional: Section 201's backup definition of electioneering communications as severed and Section 204 to the extent that it applies to non-*MCFL* organizations. I find unconstitutional: Section 201's primary definition; Section 204 insofar as it applies to *MCFL* organizations; and Section 213. For the reasons set forth in this opinion, I also find unconstitutional Section 318 and and Section 504. All of my other judgments are set forth in the Per Curiam opinion.

## FINAL JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and the four opinions of the three-judge District Court hearing these eleven consolidated actions, it is this 1st day of May, 2003, hereby

ORDERED that Plaintiffs' Motion for Judgment [#206] is GRANTED IN PART and DENIED IN PART; it is further

ORDERED that Defendants' and Intervenors' Motion for Judgment [#204] is GRANTED IN PART and DENIED IN PART; it is further

ORDERED that in regard to Section 101 of BCRA, judgment for Plaintiffs is entered in part with regard to new FECA Sections 323(a) and 323(b) and judgment for Defendants is entered in part with regard to new FECA Sections 323(a) and 323(b), in accordance with Judge Leon's Memorandum Opinion. Section 323(a) is constitutional only to the extent it bans national party committees from using nonfederal funds for Section 301(20)(A)(iii) activities and Section 323(b) is constitutional only as applied to Section 301(20)(A)(iii) activities; it is further

ORDERED that in regard to Section 101 of BCRA, judgment for Plaintiffs is entered with regard to new FECA Section 323(d); it is further

ORDERED that in regard to Section 101 of BCRA, judgment for Defendants is entered with regard to new FECA Sections 323(e) and 323(f); it is further

ORDERED that in regard to Section 201 (challenged disclosure provisions only), with the exception of subsection (5), and in regard to Sections 202, 214(a), 214(d), and 311 of BCRA, judgment for Defendants is entered in accordance with the *per curiam* opinion; it is further



ORDERED that in regard to subsection (5) of Section 201, judgment for Plaintiffs is entered in accordance with the *per curiam* opinion; it is further

ORDERED that in regard to Sections 214(b), 214(c), and 212, Plaintiffs' motion is DENIED on justiciability grounds in accordance with the *per curiam* opinion; it is further

ORDERED that in regard to Section 203 of BCRA, judgment is entered for Defendants with regard to that provision's applicability to the backup definition of "electioneering communication" as defined in Section 201 of BCRA, in accordance with Judge Leon's Memorandum Opinion; it is further

ORDERED that in regard to Section 204 of BCRA, judgment is entered for Defendants in accordance with Judge Leon's Memorandum Opinion; it is further

ORDERED that Judgment for Plaintiffs is entered with regard to Sections 213, 318, and 504 of BCRA; it is further

ORDERED that in regard to Sections 304, 316, 319, 305, and 307, Plaintiffs' motion is DENIED on justiciability grounds; it is further

ORDERED that Defendants and their agents are permanently enjoined from enforcing, executing or otherwise applying those sections of BCRA found unconstitutional by this three-judge District Court.

SO ORDERED.